administrator with the will annexed, alleging that the property ordered to be sold for the testator's debts was amply sufficient for that purpose, and also to pay the several legacies charged upon it, and that there is no necessity, therefore, of resorting to the proceeds of the rice crop for the payment of the debts of the estate, and they pray that the same be paid to them according to the statute of distributions.

The facts of the case are not denied by the answers, but it is insisted that the undisposed of property is first liable to the payment of the debts, and his Honor being of that opinion, in ordering a reference for an account of the estate, directed the commissioner to proceed (299) upon that basis, from which order the plaintiffs appealed to this Court.

The court below reserved the question of interest, with leave for either party to move in the cause concerning the point as advised; and in behalf of the four grandchildren, to whom legacies of $1,000 each were given, it was moved in this Court that the commissioner should be directed to allow interest thereon from the death of the testator.

London for plaintiffs.
Strange for defendants.

BATTLE, J. It is now, and has been for a long time, well settled, both in England and in this country, that the primary fund for the payment of the debts of a testator is the personal effects of which he has made no disposition in his will, and that this rule is not varied by the fact that he has expressly directed other property, real and personal, to be sold and applied to the payment of his debts. *Roberts v. Wortham,* 17 N. C., 173; *Palmer v. Armstrong, ibid.,* 268; *Dickens v. Cotten,* 22 N. C., 272; *Graham v. Little,* 40 N. C., 407; *Kirkpatrick v. Rogers,* 42 N. C., 44. This is admitted by the counsel on both sides, but the counsel for the plaintiffs contends that the testator has the right to appropriate what part of his estate he pleases to the payment of his debts, to the entire exoneration of every other part, and that he has, in the case now before us, set apart for that purpose the property which he has directed to be sold by the second clause of his will, and that, consequently, the proceeds of the crop of rice, of which he has made no disposition, must be equally divided amongst his next of kin. It is not denied that a testator may, if he choose, exempt an undisposed of residue from the payment of his debts by throwing that burden upon other property specifically devised and bequeathed for that purpose; but in order to do this, his intention must be very clearly manifested by the terms which he uses. A testator very rarely intends to die intestate as to any part of his estate, and a devise or bequest for the payment of debts is in

(300) most cases as consistent with the idea that it was intended to be in aid of the residuum undisposed of as in exoneration of it. In *Palmer v. Armstrong, supra,* to which reference has been made, the Court say that "charging a particular debt on a legacy, specific or general, will attach it to that legacy in the same manner as if it be expressly given, minus so much. But these words, 'after payment of debts,' generally do not mean that this legacy, and *this alone,* should answer creditors. It so means as against other legatees, but not as against other personalty not disposed of. The testator intended to provide for his legatees and not for his next of kin, and the latter can claim only upon the score of intestacy, in which case the debts must be paid before a distribution unless the testator has expressly ordered otherwise."

These remarks are directly applicable to the present case, and are decisive of it. The direction given by the testator that the proceeds of the sale of his Brunswick plantation and of the articles of personal property mentioned in the second clause should be "applied first to the payment of his debts," and then to be disposed of to certain legatees has precisely the same signification as if he had said that they should be so disposed of "after the payment of his debts." In neither form of expression is the idea involved that personal chattels not bequeathed to any person should be exonerated from their appropriate burden of paying debts, while each form of words manifests clearly the intention that all the other legatees should be exonerated from that burden. Our opinion is that the decree rendered in the court below, in accordance with the principles herein declared, is correct and must be affirmed.

Upon the question whether interest is to be allowed upon the general pecuniary legacies to the grandchildren from the death of the testator, our opinion is that, as it is not shown that he stood towards them in the relation of parent, the general rules applies, and interest is payable only from the end of one year after the death of the testator. See *Harrell v. Davenport,* decided at the last term and reported *ante,* 4.

PER CURIAM. Decree below affirmed.

Cited: Miller v. London, 60 N. C., 630; *Hart v. Williams,* 77 N. C., 428; *Moore v. Pullen,* 116 N. C., 287.

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(301)

SAMUEL ROGERS AND WIFE v. JAMES BRICKHOUSE ET ALS.

1. Where a testator, at the time of the making of his will, which was in 1852, owned a small piece of land called the "Godwin tract," to which he afterwards added, by purchase, two adjoining tracts (a part of one of which

latter had been purchased from Godwin), and the whole had been cultivated as one farm, it was *Held* that the whole passed under the denomination of "the Godwin tract."

2. A devise of land to be sold and the proceeds divided among the testator's "heirs at law," there being no context showing that the words were not used in their technical sense, was *Held* to require a distribution *per stirpes*.

3. And it was *Held, further*, that where personal property was embraced in the same clause with land, and there was no reason why a different rule of construction should be applied, the distribution as to it should be made in like manner.

4. By a will made in 1852, a slave born before the making of the testator's will was *Held* not to pass under the term "increase."

CAUSE removed from the Court of Equity of MARTIN.

Matthew Brickhouse made his will in 1852 and died in 1857. The plaintiff Samuel Rogers and the defendant James Brickhouse were appointed executors in the said will, and they both were qualified as such. The bill is filed by Rogers and his wife against James Brickhouse and the several legatees under the will, praying that the said James may account for the amount of the estate that came into his hands, and the several legacies may be paid over under a decree of this Court, and the said Samuel, for his protection and indemnity as executor and that for his coexecutor, asks the advice and direction of the Court upon several questions growing out of the construction of the will.

By the third clause of the said will, the testator devises as follows: "To my daughter, Joanna Brickhouse (who is the wife of defendant James Brickhouse), and her heirs forever, all my lands, except the Peter place, the Godwin tract, and the great swamp tract, which several pieces I devise to be sold by my executors, and the moneys arising from said sale to be equally divided among my heirs at law."

At the making of the will the testator owned a piece of land (302) containing 8½ acres, which had formerly belonged to one Emily Godwin, and hence was called the "Godwin land." Afterwards, in 1855, the testator bought of one Saunderson a tract of about 200 acres; and afterwards (in 1857) he bought of one Benjamin B. Brickhouse a tract of about 60 acres, one-half of which had once belonged to Emily Godwin. These two last mentioned tracts adjoined each other and were only separated from the 8½ acre tract by a public road, and the three tracts were occupied and cultivated as one tract with the same gang of hands under the same superintendence.

James Brickhouse and his wife claimed that all the said land except the 8½ acres passed to her, whereas the several parties defendant coming in under the description of heirs at law claim that the whole of these

three tracts fall under the denomination of the "Godwin land," and must be sold for the benefit of the fund in which they are interested. The plaintiff prays the advice of the Court on this point.

A further question arises under this clause, which is, Whether the money arising from the sale of this excepted land is to be distributed *per stirpes,* or *per capita?*

Also, in the ninth clause, the testator devises and bequeaths the *residue of his estate to be sold and the proceeds equally divided among his heirs at law,* and the same question as to the mode of distribution is made as to both the real and personal property contained in this clause.

By the fifth clause of the will, the testator bequeaths as follows: "I give and bequeath to my granddaughter Ann Cahoon a negro girl named Hasty, and her increase." At the time of the making of the will Hasty had one child about 18 months old, which was not named in the will, and has had no other before or since. The bill states that Ann Cahoon claims this child Hasty under the above bequest, and that the others insist that it must be sold under the said ninth clause of the will, and he asks that this conflict may be resolved by the Court so as not to prejudice the executors.

By the eighth clause the testator devises as follows: "I give and bequeath to my daughter Joanna Brickhouse 100 barrels of corn,
(303) 6,000 pounds of fodder, and all my crop of potatoes." The defendant James, for his wife, claimed the crop of potatoes which was growing on the land at the testator's death, to which the others objected, and the plaintiff asks to be informed as to this point.

The other exception involves only matters of fact and is sufficiently apparent from the opinion of the Court.

Rodman for plaintiff.
Winston, Jr., for defendant.

BATTLE, J. The bill is filed for the purpose of obtaining a construction of the will of the testator, Matthew Brickhouse. Several questions are raised, which we will proceed to consider and dispose of in the order in which they are presented.

1. The first question arises on the third clause of the will, and the facts in relation to it are as follows: When the will was executed in September, 1852, the testator owned 8½ acres of land, which were called and known as the Godwin tract, from the fact that they had once formed a part of a tract of land belonging to a person of that name. He afterwards purchased, at different times, lands lying adjacent to the 8½ acres, a portion of which had belonged to Godwin, and another of about 30 acres had been owned by a different person. All these lands

were cultivated by the testator, after his purchase of them, as one farm. The question is, Are they excluded from the devise to the testator's daughter Joanna by being included in the exception of the "Godwin tract"? We are clearly of opinion that they are. The will was executed after the passage of the act of 1844 (see Rev. Code, chap. 119, sec. 6), and must be construed as to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, which was in October, 1857. Thus speaking and taking effect, it is settled that the Godwin tract will embrace what is known and cultivated as such, though composed of different parcels of land bought at different times. See *Brad-* (304) *shaw v. Ellis,* 22 N. C., 20, and the cases referred to in the note to the second edition. These lands, though excepted out of the devise to the testator's daughter Joanna are directed to be sold by the executors and the proceeds to be equally divided between the testator's heirs at law, which is, in effect, a devise to them, and brings the case directly within the operation of the statute above referred to.

2. Another question is raised upon this third clause, as well as upon the ninth clause, as to how the division is to be made, whether *per stirpes* or *per capita.* We think the former mode is clearly indicated. As there is nothing in the will to show that the terms "heirs at law" are not used in that technical sense, we are bound to take them in that sense, and direct the distribution of the proceeds of the lands as the lands themselves would have descended by law to the heirs *per stirpes.* The personal property, if any be embraced in the ninth clause, must be governed by the same rule, it being given in the same terms which were applied to the proceeds of the real estate, and we being unable to discover any purpose in the will to make a different distribution of it.

3. The late case of *Williamson v. Williamson,* 57 N. C., 281; *S. c., ante,* 142, shows beyond all doubt that the testator's granddaughter Ann Cahoon does not take the child of the negro girl Hasty, which was born before the will was made.

4. For the reason that the will, by force of the act of 1844, to which reference has heretofore been made, speaks and takes effect as at the time of the death of the testator, we think his daughter Joanna was entitled to the crop of potatoes then growing.

5. The testator's son-in-law James Brickhouse alleges in his answer, that by an agreement with the testator, he was to have one-half of the crop for his services, and in consequence thereof he sets up a claim to that effect as to all the crops of various kinds growing on the testator's land the year in which he died. There is no proof of such agreement, and we must declare that it did not exist. The consequence is that, as one of the executors, he must account for all the crops (305)

which were on the testator's land at the time of his death, except those portions of them which were expressly bequeathed to his wife, to wit, 100 barrels of corn, 6,000 pounds of fodder, and all the crop of potatoes. He will be entitled to keep all the produce of his own land for that year. A decree may be drawn upon the principles declared in this opinion.

PER CURIAM. Decree accordingly.

Cited: Grandy v. Sawyer, 62 N. C., 10; *Edwards v. Tipton,* 77 N. C., 226; *May v. Lewis,* 132 N. C., 117; *Grimes v. Bryan,* 147 N. C., 251.

ALEXANDER F. SMITH ET ALS. v. CHARLES SMITH ET AL., EXECUTORS.

The statute (Rev. Code, chap. 119, sec. 28) giving the legacy intended for a deceased child to his or her children, where the parent died in the lifetime of the testator, was *Held* not to be intended for the benefit of the creditors of such deceased parent.

CAUSE removed from the Court of Equity of DAVIDSON.

The bill is filed by the legatees of Casper Smith, Sr., against his executors for an account and settlement of their legacies. Five of the plaintiffs are the children of Casper C. Smith, and are represented by their guardian, A. F. Smith. The said Casper C. Smith was the son of the testator, and was alive at the time the will was made, but removed from the State, and died in Texas without leaving any property here. At the time of the deaths of both Casper Smith, Sr., and Casper C. Smith, the plaintiff A. F. Smith held a bond on the two for $....., in which Casper C. was the principal. The only question of interest presented by the case is, whether the Court will decree that defendants, as executors of Casper Smith, Sr., shall pay and settle the said debt with A. F. Smith out of the legacy intended for Casper C. Smith, so (306) as to be discharged *pro tanto* from the claims of his children, or whether they are to account for the whole of said legacy to the plaintiffs, his children. The answers of the defendants do not vary this statement of facts, which is taken from the bill, but they submit to be governed by the decree of the Court in the premises.

Gorrell for plaintiffs.
McLean for defendants.

BATTLE, J. The only question which the pleadings present for our decision involves the construction of sec. 28, chap. 119, of the Revised Code, which is in the following words: "When any person, being a

child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator, leaving issue, and any such issue of such person shall be living at the death of the testator, such devise or bequest shall not lapse, but shall take effect and vest a title to such estate in the issue surviving, if there be any, in the same manner, proportion, and estate as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

In the case now before us, Casper Smith, the testator, devised and bequeathed to his son Casper C. Smith both real and personal estate. The son was alive at the time when the will was made, but died before his father, leaving several children, who are the present plaintiffs. At the time of the son's death, his father was his surety for a debt, which the defendants, as his father's executors, have been called upon to pay. The creditor is the guardian of the deceased son's children, and is willing to permit the executors to pay the debt out of the property devised and bequeathed to the deceased son if, upon the true construction of the act, to which reference has been made, his children take the property subject to the payment of their father's debts.

The act contained in the Revised Code is taken, with some (307) slight changes of phraseology, from sec. 15, chap. 122, Rev. Stat., which was a literal reënactment of the act of 1816 (chap. 915, Rev. Code of 1820) with the preamble omitted.

The question which we are now called upon to consider has not, so far as we are aware, been the subject of judicial consideration, and we are, therefore, left to determine it without the aid of precedents upon those rules of construction which the judges and sages of the law have laid down as guides for the exposition of statutes. One of these rules is, that an inquiry should be made as to what was the old law, what the mischief which existed under it, and what the remedy applied by the Legislature, the words of which must be so construed as to suppress the mischief and advance the remedy. 1 Blackstone Com., 87. The Legislature has itself furnished us the necessary lights in making this inquiry, by the preamble which was annexed to the original act of 1816. That preamble reads as follows: "Whereas it is the rule of common law, as in force and use in this State, that where any person makes a last will and testament in writing, and devises any portion of his or her estate to his or her child or children and the heirs, executors, administrators and assigns of such child or children, and such child or children dies before such testator or devisor, leaving issue, that then, and in that case, the legacy, share, or proportion of such testator's estate so devised lapses or falls into the residuum, where one is devised, and in other cases descends and

is distributable among his next of kin generally, as in cases of intestacy, to the prejudice of the beneficent views of such testator and to the just expectations of the issue of such child or children; for prevention whereof, *Be it enacted, etc.*" It is apparent from this that prior to 1816, the law was such that if a devise or bequest were made by a testator to his child, and such child died in his lifetime, leaving issue, the devise or legacy would lapse and fall into the residuum if there were any residuary clause in the will; or if there were none, would be intestate property and descend to the heirs at law or be distributed among the
(308) next of kin of the testator, according to the nature of the property. The mischiefs which the Legislature had in view, and which they intended to prevent, was that the benevolent intentions of the testator towards the issue of his deceased child were frustrated and the just expectations of such issue were disappointed. Not a word is said, nor is the slightest intimation given, that any part of the mischief existing under the old law was that the creditors of the deceased child would fail to have an opportunity to secure their debts out of the lapsed devise or legacy. The issue alone, and not the creditors of the deceased child, were in the contemplation of the Legislature, and, accordingly, the remedy will be found to apply only to them. By the original act of 1816, and by it as revised in 1836 (1 Rev. Stat., chap. 122, sec. 15), the issue are to take the devise or legacy "in the same manner and to the same extent" as it would have vested in the deceased child had he or she been in full life at the death of the testator. In the Revised Code, the provision in favor of the issue of a deceased child makes them take the devise or legacy "in the same manner, proportions, and estates as if the death of such person had happened immediately after the death of the testator unless a contrary intention shall appear by the will." The form of expression in the latter enactment varies somewhat from that of the former, but the idea is the same—that the issue, whether one or more, is or are to take the devise or legacy and to take the same estate in it which his, her, or their father or mother would have taken had he or she survived the testator, whether as a tenant in severalty or a tenant in common with others. Had the Legislature intended the issue to take the property subject to the debts of the deceased child a very different phraseology would have been necessary to express clearly and fully that intention, particularly with regard to personal estate. In that case the language would have been, in substance, that the legacy should vest first in the executor or administrator of the deceased child, to be by him distributed, after the payment of debts, among the children of his testator or intestate. We cannot believe that any such idea was in the mind of the legislators, and we therefore declare our opinion to
(309) be, in the case before us, that the children of the deceased devi-

see and legatee Casper C. Smith take the real and personal estate devised and bequeathed to him by the defendant's testator without any liability for the debt mentioned in the pleadings. A decree may be drawn in accordance with this opinion.

PER CURIAM. Decree accordingly.

ROBERT F. STOCKTON v. BENJAMIN F. BRIGGS.

1. A court of equity will not interfere to enjoin the collection of a judgment upon an allegation of error in the court of law rendering it.

2. Where, therefore, in an action at law for the breach of a contract, the breach assigned was the removal of certain machinery, which, by the terms of the contract, the defendant was bound to leave on the premises, the defendant offered to prove that the contract was rescinded by mutual consent and the plaintiff agreed to allow the defendant to remove the machinery, and the court held the evidence inadmissible, whereby a verdict and judgment passed against the defendant, it was *Held* that he had no relief against this error in a court of equity.

3. Except to stay waste or prevent irreparable injury, an injunction can only issue as ancillary to some primary equity.

APPEAL from an interlocutory order of the Court of Equity of GASTON continuing an injunction; *Manly, J.*

The bill sets out that the defendant visited the plaintiff in the city of Philadelphia and proposed to sell him a tract of land lying in the county of Gaston, North Carolina, known as the King's Mountain gold mine tract, which mine the defendant represented to be of extraordinary richness; that the plaintiff knew nothing of the mine, but that he, believing his statements to be true, made a conditional purchase of the property for the sum of $50,000, stipulating with the defendant that he (plaintiff) should have possession of the property from and after the time of the contract; that the plaintiff might open and explore (310) the mine and apply such tests as he might think proper, when the plaintiff might decide whether he would take the property and make the purchase absolute; that it was further stipulated that the plaintiff should have all the ores and sands which were lying out on the surface of the mine, and it was further stipulated that in the event the plaintiff should determine not to take the property at the stipulated sum, that in that event the defendant should be entitled to the machinery erected for the purpose of testing the mine. The bill further states that in pursuance of this agreement plaintiff ordered for the mine such machinery as he thought sufficient for testing it; that afterwards he visited the mine himself, and finding that more extensive and powerful machinery would be

necessary than he at first supposed, he informed the defendant of this fact, and proposed to him to erect the more costly machinery if he (defendant) would rescind the stipulation in the contract by which he became entitled to it in case plaintiff should decide not to take the property; that the defendant suggested that if the plaintiff would relinquish his right to the ores and sands on the surface, he would agree to the proposal; that this agreement was then entered into verbally, but was never reduced to writing. It is further stated in the bill that the plaintiff, acting upon the verbal agreement, proceeded to erect two steam engines and other machinery at the mines and to order a large amount of costly machinery; that afterwards, being on his way to the mine, plaintiff met defendant at the village of Chester, in the State of South Carolina; that defendant stated that important discoveries of ore had been made at the mine; that he had in his possession some rich specimens, and thought the mine worth more than what he agreed to take for it, and that he desired to rescind the contract of purchase altogether and to take back the property, and therefore and thereupon it was agreed that plaintiff should surrender the mine to the defendant and remove the machinery as soon as possible, which he proceeded to do imme-
(311) diately. It states further that the defendant afterwards, seeking to enforce this rescinded contract, issued a writ in the Superior Court for the county of Gaston, claiming damages for the removal of the machinery; that this action at law, coming on to be tried at Spring Term, 1858, of Gaston Superior Court, it was decided that none of the matters set forth in this bill were proper legal defenses to the said action, and Briggs, the defendant in the present suit, recovered a judgment against the present plaintiff for the sum of $5,000, and has issued execution to enforce its collection.

The bill prays for a perpetual injunction to restrain the defendant Briggs from enforcing this judgment.

The answer of the defendant admits the terms of the original contract, as set forth in the bill, but positively denies that there was any rescission of the contract at the mine on the occasion alluded to in the bill and as therein charged. With reference to the alleged rescission of the contract at Chester Courthouse, in South Carolina, the answer sets out the following facts: That whilst the plaintiff was absent from the mine, defendant discovered some very rich specimens among the ores raised from the mine by plaintiff's employees, and a few days thereafter met the plaintiff at the village of Chester, in South Carolina; that the defendant exhibited these specimens of ore to the plaintiff, and remarked that he should not be surprised if the King's Mountain mine turned out to be worth half a million; to this plaintiff replied sneeringly, "If you think so, I ought not to think of taking it for the paltry sum of $50,000."

That defendant, being provoked by his manner, sharply replied that he was not bound to do so, and "could exercise his own pleasure in the matter." To this plaintiff replied, "If you will permit me to take away my machinery, I will quit the mine and give you up the possession." That defendant peevishly closed the altercation by saying that he "might do so as soon as he pleased." The answer further states that on the next day, and before the plaintiff had done anything towards removing the machinery, the defendant, having recovered from his excitement, wrote to the plaintiff, notifying him that he should hold him (312) (plaintiff) to his original contract.

The other material facts alleged in the bill are substantially admitted by the answer.

Upon the coming in of the answer, the defendant moved to dissolve the injunction. Motion disallowed. Injunction continued to the hearing. Defendant appealed.

Boyden and Badger for plaintiff.
Guion, Fowle, and Thompson for defendant.

PEARSON, C. J. The allegation of the plaintiff, that in November, 1854, a few months after the original contract was entered into, it was so modified as to allow him to remove the machinery which he was to erect for the purpose of testing the mine, being distinctly and positively denied by the answer, is to be put out of the case at this stage of the proceedings.

The allegation that in April, 1855, at Chester Courthouse, the parties, by mutual consent, agreed to rescind the contract altogether, "and therefore and thereupon it was agreed by the plaintiff and defendant that the plaintiff should surrender to the defendant the mine and *remove the machinery* as soon as possible," is denied in a qualified manner—that is, the defendant admits that, having become excited, he did propose to rescind the contract altogether, and the plaintiff immediately agreed to do so, but defendant avers that as soon as his excitement passed off, to wit, on the next day, before any action had been taken by either party, he notified the plaintiff, in writing, that, upon consideration, he withdrew the proposition to rescind the contract and should hold the plaintiff liable according to their original contract; and he insists that as he acted under moral duress—or, rather, under surprise—he had a right, as soon as he recovered from it, to withdraw his proposition.

This presents an interesting question. Is this qualified denial responsive to the allegation of the bill, and of such a nature as, according to the course of the Court at this stage of the proceeding, to leave the plaintiff in the condition of not having his allegation (313)

admitted, or is it to be taken as confessing the allegation and offering new matter in avoidance, so as to put on the defendant the burden of proving it, and allow the plaintiff to consider his allegation as admitted for the purpose of resisting the motion to dissolve the injunction? We will not enter into it because there are objections on the face of the bill which show that the injunction was improvidently granted, and consequently there is error in the decretal order refusing to dissolve the injunction and continuing it over to the hearing.

The scope of the bill is to obtain a perpetual injunction restraining the defendant from enforcing his judgment at law. There is no primary equity which the bill seeks to set up, and in aid of which the injunction is asked for, but the sole object is to have a perpetual injunction, and there the matter is to stop. Except to stay waste or to prevent irreparable injury, an injunction can only issue in aid of and as ancillary to some primary equity which the bill seeks to enforce. This is well settled, and we presume the defect in not setting out some primary equity is attributable to the fact that there is no equitable ingredient involved in the case.

As the ground for coming into this Court for relief, the plaintiff alleges, that notwithstanding the contract was rescinded, and by mutual consent it was agreed that he should remove the machinery, which he did in pursuance of the agreement, the defendant brought an action at law against him for breach of the original contract by removing the machinery, which action coming on to be tried in the Superior Court of law it was decided and held that "none of the matters set forth in this bill were proper and legal defenses to the said action, and the defendant recovered a judgment," and the plaintiff now insists that it is against conscience for the defendant to enforce the judgment.

Assuming the matter set forth in the bill to be true, the plaintiff had a clear *legal right* to remove the machinery, and consequently had
(314) a good defense to the action at law. But the failure to establish it does not give him an *equitable* right unless the error of a court of law can create an equity. No authority was cited for this position, and there is no principle upon which it can be supported. It would be a new head of equity jurisdiction. If a party obtains a judgment at law by fraud, as by subornation of perjury, or the like foul means, equity will give relief—not by taking possession of the case, going into the trial of legal rights and granting a perpetual injunction, but by acting in aid of the common-law court and decreeing that the party shall consent to set the judgment and verdict aside and have a new trial at law, and in the meantime, as ancillary to this relief, an injunction will be granted. *Pegram v. King,* 9 N. C., 297; *Wilson v. Leigh,* 39 N. C., 97; *Powell v.*

Watson, 41 N. C., 98; *Houston v. Smith, ibid.,* 264; *Dean v. Erwin,* 42 N. C., 250.

These and many other cases support the position that equity will give relief against a judgment obtained by the *fraud* of the *party,* but there is none to support the position that it will give relief against a judgment because of *error* in the court. On the contrary, it is settled, where there is a legal right and a regular trial before a competent court, the matter is concluded, both in equity and at law, so long as the judgment is unreversed. *Wilson v. Leigh, supra; Martin v. Harding,* 38 N. C., 603. In *Dean v. Erwin, supra,* this doctrine is assumed, and the Court say: "This Court cannot review the decision of a court of law upon a question addressed to its discretion, from which there is no appeal, for the same reason that *it cannot review a question of law* from *which there is an appeal"; and* in *Fentress v. Robbins,* 4 N. C., 610, the Court say: "In this respect, the bill is for relief against the errors of the judgment at law. If these facts laid any foundation for a suit in equity, there would soon be an end to all proceedings at law upon one or other of these points, either to hear *errors* of the court or *retry* the facts falsely found by the jury—all causes would end in chancery and (315) the courts of common law be abolished."

Suppose an action of assumpsit for a money demand; plea: *non assumpsit.* The defendant offers to prove *payment;* the court holds the evidence inadmissible for want of a special plea; judgment for plaintiff. Can the defendant obtain a perpetual injunction on the ground that it is against conscience for the plaintiff to take advantage of the error of the court and make him pay the debt a second time? Or suppose, which is our case, an action for the breach of a contract; breach assigned: the removal of machinery, which, by the terms of the contract, the defendant was bound to leave on the premises; the defendant offers to prove that the contract was rescinded by mutual consent, and the plaintiff agreed to allow the defendant to remove the machinery; the court holds the evidence inadmissible, either because the parties could not by parol rescind a written contract or because the agreement to rescind was *nudum pactum,* or some other erroneous ground, and there is judgment for the plaintiff, can the defendant obtain a perpetual injunction on the ground that it is against conscience for the plaintiff to take advantage of the error of the court and make him pay damages for doing an act which he had expressly agreed that he might do? If equity has this jurisdiction "all causes will hereafter end in chancery and the courts of common law be abolished." Other points were mooted in the interesting argument with which the Court was favored, to which it is unnecessary to advert.

There is error in the decretal order. It should be reversed and the motion to dissolve the injunction allowed.

PER CURIAM. Reversed.

Cited: Whitaker v. Bond, 62 N. C., 227; *Molyneux v. Huey,* 71 N. C., 111; *Moore v. Gulley,* 144 N. C., 85.

(316)

HATCH WHITFIELD v. BUCKNER L. HILL ET AL.

1. A purchaser (even with notice) from one purchasing fraudulently, at a sheriff's sale (as by preventing a fair competition among bidders), who has had the land in possession for more than seven years before a suit in equity is brought for a reconveyance, is protected by the statute of limitations.

2. An action of ejectment, predicated on the assumption that a deed made by a sheriff for land sold, is void on account of a fraudulent suppression of bidding, is not the same cause of action with a right asserted in a court of equity to have the purchaser converted into a trustee, and to have a reconveyance, which assumes that the sheriff's deed is valid to pass the title, and, therefore, the pendency of the former is not a good answer to the plea of the statute of limitations.

3. If it appear on the face of the bill that the plaintiff's case is barred by the statute of limitations, advantage may be taken of it by motion on the trial.

CAUSE removed from the Court of Equity of WAYNE.

Lemuel H. Whitfield had been the guardian of the defendant William A. Whitfield, and the plaintiff Hatch Whitfield was his surety on his guardian bond. The plaintiff, in 1839, removed to the State of Mississippi, and was residing there in 1840, when a writ was taken out against the said Lemuel H. and himself on account of the said guardian bond. This was served upon the former, but the plaintiff not being found a judicial attachment was taken out, which was levied on six tracts of land, lying contiguous to each other, containing about 5,973 acres, and two lots in the town of Waynesboro, and on advertisement being made, a judgment was taken against Lemuel H. Whitfield and himself for $2,325.66. There was an execution taken out as to L. H. Whitfield and levied on his land and slaves, and a *venditioni exponas* taken out to sell the lands of the plaintiff which had been levied on by the judicial attachment, and they were sold for $2,000. At the sale of the lands the defendant W. A. Whitfield declared publicly that he did not wish any one to bid against him for the land about to be offered; that he only wanted to bring his brother Hatch Whitfield, who was then in Mississippi, to a settlement, and he was afraid if any one else bought the land he would not let his brother have it back; that he would sell the

outskirts of the land and let his brother have the home plantation. (317) In consequence of these assurances and others of the same kind made before, several persons abstained from bidding, and, amongst others, the defendant Buckner L. Hill, and the defendant W. A. Whitfield was thus enabled to buy the land at greatly below its value, to wit, $2,000. A part of the land in question adjoined the defendant Hill, and he was very solicitous to buy this part, and went to the courthouse on Monday, the day advertised for the sale, with the view and purpose of bidding for the land, but he was dissuaded from doing so by the representations made to him by the defendant Whitfield, of the character above set forth, so that he was not present at the sale at all. Afterwards (in a short time) he got from the defendant Whitfield the land he wanted, amounting to about 1,902 acres, by paying him a full price for it, to wit, $2,377.50. W. Whitfield also sold a small portion of it to one Herring.

The bill alleges that the plaintiff had no knowledge of the proceeding in court upon which the judgment was taken against him until after the sale of his lands, living, as he then did, in a distant State and having received no information on the subject; that Lemuel Whitfield, the other defendant in the execution and the real debtor, had abundant means within the bailiwick of the sheriff, consisting of lands and slaves, to satisfy the judgment; that he went forward and insisted that if any one's property was to be sold to satisfy this debt it should be his; that the land bought in by W. A. Whitfield was worth at least $10,000, and that several of his friends who were present at the sale urged that the land should be sold in separate tracts, and that if this had been done, and a fair competition allowed, there would have been no necessity for selling more than the town lots and one of the tracts; but that all this was met by the assurance that Lemuel Whitfield had put money into the hands of plaintiff to pay the debt, and that all he wanted was to force his brother to a fair settlement of the claims he had against him, and that the sheriff, in his course, was influenced by this assur- (318) ance; that there was a fraudulent combination and agreement between the defendants W. A. Whitfield and Hill—for the former to buy the land and for the latter to have it from him at nearly the price he might give for it—and that a few days after this sale this fraudulent arrangement was consummated by the defendant Whitfield conveying a part of the land set forth distinctively in the pleadings for the sum above stated. This bill was filed in 1856.

The defendant W. A. Whitfield did not answer the bill, and a judgment *pro confesso* was taken, and the bill heard *ex parte* as to him.

The defendant Buckner L. Hill answered, denying that he made any arrangement or had any understanding with his codefendant as to

stifling competition in the bidding for the land, or was cognizant of any trust or arrangement between the brothers, or of any equitable claim the plaintiff had to have the land levied on or any part of it reconveyed; that he did desire to have a part of the land, and went to the place appointed for the sale in order to bid for it, but the sale was postponed, as he then understood from a friend of the plaintiff, because of some defect in the advertisement, and he gave himself no further concern about the matter until after the sale (at which he was not present), when the other defendant approached him and offered him a part of the land; that after some negotiation he agreed to give, and did give, the sum stated for the number of acres above set forth; that this was the very highest market price for the land and more than he would have given if he had not previously agreed to abide by the price which a referee mutually chosen by them should fix upon; that he paid $700 down and the remainder of the sum after the land was surveyed and the deed made to him.

There were no proofs taken in the cause, the substance of which, material to the case, is set forth in the previous part of the statement.

The prayer of the bill is for a reconveyance of the land and for an account.

(319) After the sale to Hill, he entered upon a part of the premises and has cultivated it ever since. For this part the plaintiff, in 1842, brought an action of ejectment, which has pended ever since in the court of law, and is still there pending. As to another part of this land, this defendant has not been able to get possession, but he commenced an action of ejectment for that part in the said court of law about the time the suit was begun against him, which is still pending. *Hill v. Whitfield,* 48 N. C., 120.

E. G. Haywood and McRae for plaintiff.
J. H. Bryan, W. A. Wright, and Dortch for defendants.

PEARSON, C. J. We are satisfied the defendant Whitfield "stifled the bidding," and was enabled to buy the land for a sum greatly under its value, by assuring several gentlemen who wished to purchase that his object in forcing a sale was merely to effect a "brotherly arrangement" and compel his brother to come to a fair settlement, upon which he would reconvey the land, and requesting them, as it was a family matter, not to bid against him. We are satisfied that the defendant Hill was one of the gentlemen who was influenced, either directly or indirectly, by these assurances and representations not to bid. But the allegation that Hill colluded with William A. Whitfield, and was induced not to bid by reason of an understanding that he was to share in the spoils and take

the part of the land which he wished to buy "at nearly the same rate that William Whitfield should buy it at," is not proved; on the contrary, we are satisfied that he gave a full and fair price. It is true, the fact of his buying so soon after the sheriff's sale raises an inference that his conclusion not to attend the sale and bid was in some measure attributable to an expectation that he would be able to buy the part of the land he wanted from William A. Whitfield should he become the purchaser. Whether this expectation was caused by the circumstance that the embarrassment under which William Whitfield labored, in consequence of the delay and difficulty in drawing his funds out (320) of the hands of his guardian, would compel him to sell a part of the land, or by a direct assurance to that effect, is a question which need not be solved, for, assuming that Hill expected to buy a part of the land, the significance of this fact is, in a great measure, taken away by the fact that he expected to give, and did give, a full price for it; so the amount of it is: he was induced not to bid, as well by an expectation that he would have an opportunity to buy a part of the land as by the assurance that William Whitfield's object in forcing a sale and becoming a purchaser was simply to place himself in a condition by which he would be able to effect a family arrangement. But he expected to *make no gain* other than what is incident to the privilege of buying property at a fair price, provided the parties could agree in respect to it. And the equity of the plaintiff, as against Hill, is attenuated to this: he bought from William Whitfield *with notice* of the plaintiff's equity to have back the land upon paying the amount due to William Whitfield; but he is relieved of all imputation of a fraudulent complicity, and is entitled to this further favorable consideration: the amount paid by him was just about enough to satisfy the judgment, and he made cash payments to meet the necessities of William Whitfield, thus doing what the plaintiff was bound, not only at law, but in conscience, to have done, and may fairly claim the benefit of being considered as having done that much in part performance of the family arrangement which William Whitfield professed to be desirous of effecting.

There can be no doubt, however, that the plaintiff had an equity to have back all his land, which extended to Hill by reason of the notice, provided he had come forward within a reasonable time and offered to pay him the amount which he had advanced. The plaintiff was ill advised, and chose to insist upon a supposed legal right to avoid the sheriff's sale and hold all the land without satisfying the judgment. But for his mistake in this particular, the whole matter might at first have been easily adjusted. He had only to offer to confirm the sale to Hill, and in that way satisfy the judgment. By doing so, his right to have a reconveyance of the rest of the land would have been made (321)

too clear to admit of any doubt or opposition. Now, the question is, as he elected to insist upon a right at law, to which he was not entitled, in consequence of which there has been much litigation and a *delay of more than seven years,* during all of which time he has neglected the duty of discharging the judgment and availed himself of the opportunity which this litigation afforded to evade its enforcement, is it not *too* late for him to fall back upon an equity growing out of the fact that the bidding at a sale made by the sheriff was stifled, and claim a reconveyance of the property upon an offer now for the first time made to pay the amount due upon the judgment, provided he is allowed credit for the profits made out of the land, thus, in effect, taking advantage of his own wrong in order to reap the fruits of another's labor?

In *McDowell v. Sims,* 41 N. C., 278, it is held that the equity growing out of "puffing" at a sale must be insisted upon in a reasonable time, and it would seem, from analogy, that the equity growing out of "stifling the bidding" should be subject to a like restriction, for the defendant, in the execution, is certainly in default so long as he suffers the debt to remain unpaid. But we will not decide the question, for in this case, by the plaintiff's own showing, his equity is barred by the statute of limitations upon the principle established in *Taylor v. Dawson,* 56 N. C., 86, the sale having taken place in 1842 and the bill filed in 1856.

The pendency of the action at law does not bring this case within the exception, according to the ruling in *Hall v. Davis,* 56 N. C., 413, because the cause of action is not the same. The right which the plaintiff insisted upon at law was to set aside the sheriff's sale *in toto* and treat it as a nullity. The right which he now insists on, in equity, is to convert the defendants into trustees, assuming the validity of the sale to pass the legal title and admitting the right of the defendants to
(322) hold the land as security for the amount of the judgment and costs, which two rights are wholly inconsistent.

In this connection, it may be well to remark that the injunction in our case was improvidently granted. The plaintiff ought to have been required, as a preliminary to his coming into a court of equity, to enter a nonsuit in the action of ejectment brought by him, and to permit the defendants to take judgment in the action of ejectment brought by them, so as not to allow litigation in both courts.

It is settled, that if it appears on the face of the bill that the plaintiff's case is barred by the statute of limitations, advantage may be taken of it by motion on the trial. *Robinson v. Lewis,* 45 N. C., 58.

The bill in respect to the defendant Hill will be dismissed and the plaintiff will have a decree against the defendant William Whitfield, against whom there was judgment *pro confesso,* declaring that he is entitled to a reconveyance of the land, except the parts conveyed to Hill

and Herring, and to an account, in which the plaintiff will be allowed the sums received by William Whitfield of Hill and Herring, upon his agreeing to confirm their title as a credit, and will be charged with the amount of the judgment and costs.

PER CURIAM. Decree accordingly.

Cited: Leggett v. Coffield, post, 384; *Smith v. Morehead,* 59 N. C., 362; *Barham v. Lomax,* 73 N. C., 79; *Isler v. Dewey,* 84 N. C., 348; *Oldham v. Reiger,* 145 N. C., 258.

(323)

JOHN M. LONG v. JOHN J. CROSS AND WIFE, MARY.

Where C., being indebted to his sister, B., left the State, having made a conveyance of certain of his property to the plaintiff, and the latter agreed that if he got the property, or enough of it to satisfy his sister's debt, he would save it for her, and gave his bond for the amount thereof, and at the same time she gave him a written agreement to return the said bond if he did not succeed in getting the amount of said note from C.; on a bill for an injunction to restrain the collection of the bond, it was *Held* necessary that the plaintiff should aver that he had diligently endeavored to collect said amount from C. and had failed to do so, and that it was not sufficient for him to allege that he had failed to get the property, but that he should state how and why he had so failed.

APPEAL from an interlocutory order of the Court of Equity of CABARRUS dissolving an injunction.

The bill sets out that on 17 January, 1853, the plaintiff executed a bond for the sum of $180, payable to the defendant Mary Cross (then Mary Henderson); that this bond was for a debt owing to said Mary by one D. F. Long, and was executed under the following circumstances: One A. J. York, of the town of Concord, stated to the plaintiff at the time of the date of the above bond that it was rumored that the creditors of D. F. Long were about to levy, or had levied, upon his property. The said D. F. Long was at that time residing in the town of Salisbury, editing a paper, of which he was proprietor. York also stated to the plaintiff that D. F. Long was indebted to the mercantile firm of which he (York) was a member, and desired plaintiff to secure the debt for the firm if he could. The plaintiff stated to York that he had purchased the printing press, material, and all fixtures appertaining to the same, formerly owned by the said D. F. Long, and that if plaintiff got the press, material, etc., and they turned out as he supposed they would, in that event, he should owe D. F. Long enough to satisfy the claim of the firm, and probably more than enough for that purpose; that at the request of York, plaintiff executed his bond for this claim, with the

understanding that if he did not get the press, material, etc., then the bond was to be returned. York then informed plaintiff that D. F.
(324) Long was indebted to Mary Henderson in the sum of $180, and requested him to secure this debt for her. Plaintiff then executed his bond for the sum alleged to be due her, and delivered the same to York, who agreed to relate to her the circumstances above set out, and it was agreed between them that if she received the bond it should be on the same terms as York had accepted his. York then delivered the bond to Mary Henderson and took from her the following receipt:

"Received of J. M. Long a note of $180, for D. F. Long's account. And if J. M. Long does not succeed in getting the amount of said note from D. F. Long, this to be returned to J. M. Long.

"17 January, 1853. "MARY HENDERSON."

The bill further states that D. F. Long left this State and went to Louisiana, and has never returned, and that attachments were levied upon the printing press, material, etc., in January or February, 1853, and on all the property which D. F. Long was known to possess, and it was sold by the creditors, and of this fact both York and the said Mary Henderson were informed, and the plaintiff got none of the property. The bill further states that after the said levies and sales, York returned the bond executed to the firm, and that the said Mary Henderson, having intermarried with the defendant Cross, plaintiff demanded of them the bond executed to Mary Henderson, which they refused to return, but commenced a suit thereon, and have obtained a judgment and sued out execution on the same, which execution is now in the hands of the sheriff of Cabarrus. The bill prays for an injunction to restrain the enforcement of the judgment, and for delivery up of the bond in question.

The defendants answered fully, but since the decision of the court is predicated on the plaintiff's bill, it is not necessary to set out the answer.

Upon the coming in of the answer, defendant moved to dissolve the injunction, which motion was allowed. Plaintiff appealed to this Court.

(325) *Wilson and Jones for plaintiff.*
Barringer and Fowle for defendant.

PEARSON, C. J. To entitle the plaintiff to have his bond for $180 mentioned in the pleadings returned to him, according to the terms of the agreement signed by the defendant Mary, it was necessary for him to use all proper diligence in endeavoring to get the amount of the note from D. F. Long.

The equity which the bill seeks to enforce is to have the agreement performed, and in the meantime, as ancillary thereto, to have the col-

lection of the bond enjoined until he can establish his primary equity. It is clear, that in order to make out this equity, it was incumbent on the plaintiff to aver in the bill, and prove, that he *had used proper diligence,* and did not "succeed in getting the amount of the note from D. F. Long." The bill is fatally defective in not making this averment. It is true the plaintiff avers he has not got the money from D. F. Long, but how he happened to fail, and what efforts were made by him to get the money, if he made any, are not set out in order to show that he had used the degree of diligence imposed on him by the agreement.

The bond and agreement bear date 17 January, 1853. The plaintiff alleges that, as an inducement to the arrangement which took place between him and one York, and as preliminary to the execution of the bond and agreement in question, "he told York that he had purchased the printing press, material, and all the fixtures thereunto belonging, that D. F. Long owned, and if your orator got said press, material, and fixtures, and it turned out as it had been represented to him, he would owe the said D. F. Long enough to satisfy his claim, and probably something more." He then alleges that in *January* or *February,* 1853, the printing press, material, and fixtures, and all the property that D. F. Long was known to be possessed of, were levied upon by creditors under attachments and sold, by reason whereof he failed to get the amount of the bond from D. F. Long. This account of the matter, so far from showing that he used proper diligence, convicts him of a want of diligence. If it was true, as he told York, that he had bought the (326) printing press, material, and fixtures, how did it happen that he permitted the property to be appropriated by creditors whose levies were not made until February, the month after his alleged purchase? We say *February* because the ambiguity made by his loose allegations "January or February" must, of course, be taken most strongly against him. And why was it that, having early intelligence that D. F. Long had absconded, he took no means to assert his title to the printing press, material, and fixtures, and made no effort whatever, as far as appears by his own allegation, to secure the debt which he had undertaken to endeavor to get for the defendant Mary? For this defect in the bill and want of equity by the plaintiff's own showing, without adverting to the matter set up in answer, we concur with his Honor that the injunction ought to have been dissolved. There is no error.

PER CURIAM. Affirmed.

(327)

JAMES V. SYMONS ET AL. V. JEHIAL REID ET ALS.

1. Where the main drift and scope of a bill was to enforce an assignment in trust, and secure a dividend under it, and the prayer of it is to that effect *only*, it was *Held* that an allegation that the deed was made to defraud creditors, made heedlessly, and as an expletive, and not as a ground of relief, should be rejected as surplusage.

2. Where a trustee, appointed by deed to collect money and pay all the debts of the trustor, resided in a distant State, and in a bill by a creditor to enforce the payment of his debt, it was alleged that he was about to remove the trust funds beyond the reach of the court, it was *Held* that an injunction was proper to restrain such removal.

3. Where a deed of trust was made by a firm to secure all its creditors, one creditor, to whom the rest were unknown (they not being named in the deed), has a right to file his bill in his own name, praying for a discovery of the other creditors and the state of the fund and for the payment of his proportion, and upon such discovery being afforded, it was *Held* to be the proper practice to amend the bill by making all the creditors interested parties to the bill.

4. Where one of several creditors, secured in a deed of trust, filed his bill to enforce the satisfaction of his debt, in which he called on the trustee to set forth the names of the other creditors and the amounts due them and the general state of the fund, and the answer failed to make such discovery, whereupon the plaintiff excepted to the answer, and the exceptions were allowed, it was *Held* that an injunction obtained to prevent the removal of the funds would be continued until a full answer should be filed, and then disposed of according to the equity confessed in the answers.

CAUSE removed from the Court of Equity of DAVIDSON.

The defendants Kibbee & Ball were a mercantile firm in the city of New York, and the plaintiffs bought goods of them to the amount of $1,551.22 and gave their promissory note for the same, payable six months after date (8 September, 1857). Before the expiration of the credit Kibbee & Ball became insolvent, and on 19 November, 1857, made an assignment to the defendant Jehial Reid of their effects, in trust *for the creditors* of the firm, by which the equitable property in this note passed to Reid, and at the same time they endorsed it to said Reid on the same consideration. This note was sued on in the county

(328) court of Rowan, and judgment obtained at February Term, 1859, of that court, from which the defendants in that suit (plaintiffs in this) appealed to the Superior Court of that county; and in the latter court a final judgment was taken at Spring Term, 1859, for the full amount of the said note, interest, and costs ($1,767.18). Subsequently to the assignment to Reid, the plaintiffs purchased three notes on Kibbee & Ball, amounting, together, to something more than their note to the firm, and took an endorsement on the same without recourse on the

endorsers. The plaintiff Symons requested that these should be allowed as a credit on the judgment, which was refused, and this suit was brought to restrain the collection of the judgment, alleging that these being debts secured in the deed of assignment, and the trustee having funds enough in his hands to pay them ought not to be allowed to enforce the collection of the judgment; that he is a citizen of the State of New York, and would, if permitted to collect this money, take it out of the reach of the court. The creditors of Kibbee & Ball were not named in the deed of assignment made by them to the defendant Reid, and the plaintiffs in their bill call on the defendants to state in their answer who these are, and what amount is due to each.

The answers of the defendants state that these notes were purchased by the plaintiffs long after the suit on the note to defendants was begun and while pending in the Superior Court; that the endorsements are without date, and that the plaintiffs fraudulently pretended that they were made before the assignment to defendant Reid, and endeavored to use them as set-offs in the action at law, and that being balked in this nefarious design they had come into this Court to effectuate their purpose; that the firm of Kibbee & Ball being hopelessly insolvent, they were able to buy up these notes for a mere trifle, and paid for them in worthless stocks; that the percentage coming to the plaintiffs out of the fund in the hands of Reid is small. The answer does not state the names of the creditors entitled to participate in the fund, nor the amount due to each, nor the sum to which the plaintiffs would be (329) entitled, but avers that all this information had been given to the plaintiffs.

On the coming in of the answer, the following exceptions were filed:

1. That the trustee failed to set forth the amount in his hands.

2. That he failed to set forth the amount applicable to the debt of the plaintiffs.

3. That the defendants failed to answer whether the debts exhibited by the plaintiff are owing by Kibbee & Ball to the plaintiffs.

The motion to dissolve the injunction and to allow the exceptions were argued and considered together in the court below, and both were decided against the plaintiffs, from which they appealed to this Court.

In this Court, the counsel for the defendants brought to the notice of the Court the following allegation in the plaintiffs' bill: "Your orators further show to your Honor that on 19 November, 1857, the said Kibbee & Ball, in fraud of their creditors and in fraud of the debts which they owe to your orators, made a fraudulent assignment of all their debts, accounts, property, and estates to one Jehial Reid," and insisted that the bill was repugnant and inconsistent, and that, according to the course of the Court, no relief could be given upon it.

McLean for plaintiffs.
Blackmer and Jones for defendants.

PEARSON, C. J. We were at first inclined to the opinion that the bill was fatally defective, as being repugnant and inconsistent with itself on its face in this: it alleges that the assignment by the defendants Kibbee & Ball was in fraud of their creditors and "in fraud of the debts which they owe to your orators," and then it alleges that the plaintiffs are entitled, as the assignees of three certain notes of Kibbee & Ball, to a part of the fund in the hands of Reid, which, by virtue of the (330) assignment to him, he collected and holds in trust for distribution among the creditors, thus in one breath assailing the assignment as fraudulent and *void* as to creditors and in another seeking to set up the assignment as *valid,* and under which the plaintiffs and other creditors are entitled to a dividend of the fund.

Upon an examination of the whole bill, and particularly the relief prayed for, we are of opinion that the allegation of fraud must be rejected as surplusage and impertinent—inserted by the draftsman of the bill without intending to make it the ground of relief and as merely expletive, and to be ascribed to the loose manner in which gentlemen of the bar will indulge themselves in framing equity pleadings under the excuse of the pressure of business on the circuits, but which always embarrasses the court and frequently operates to the prejudice of clients. Stripped of surplusage, the bill sets out a plain equity—*i. e.,* to have an account of the trust fund, and the dividend to which the plaintiffs are entitled as assignees of the notes mentioned in the bill applied in payment of the judgment which the defendant Reid has obtained against them at law, and in the meantime for an injunction on the allegation that Reid is a nonresident, and if he collects the judgment will take the fund beyond the reach of the Court; and the defendant Reid is interrogated particularly and required to state the sum to which the plaintiffs are entitled, as a dividend, in the distribution among the creditors of Kibbee & Ball, and also to set out the names of the creditors.

The answer is as obnoxious to the charge of "looseness of statement" as the bill. It makes the impression that Kibbee & Ball are largely insolvent, and that the dividend to which the plaintiffs are entitled is very trifling, and, in fact, that they bought up the notes which they hold for little or nothing, with an intention to defeat a recovery at law, and at all events to embarrass the proceeding.

It is certain that the plaintiffs are entitled, as the holders of the notes in question, to a dividend of the fund—be it large or small—and to have it applied as a payment on the judgment at law, and the answer (331) is defective in not setting out what the dividend or the "percent-

age," as it is termed, amounts to, and who are the creditors entitled to the fund.

Under ordinary circumstances, in consequence of this evasion in the answer, the plaintiffs would have been entitled to have the injunction continued until the hearing, but it is evident that, as the bill now stands, the plaintiffs are not in a condition to bring the cause on for a hearing, for an account cannot be taken until all the creditors interested in the fund are made parties. On this account it was material that the answer should have set forth the names of the creditors, for although the fact of their not being named in the deed of assignment made it proper to entertain the bill in the first instance, so as to enable the plaintiffs to get a discovery, it would then have been necessary to amend by making them parties, because, manifestly, there can be no decree for an account until all the parties interested in the fund are before the court, so that they may be bound by the final decree. If this were not so, there might be as many suits as there are creditors and a different balance struck in each.

If the defendants had set out the dividend, or percentage, to which the notes held by the plaintiffs are entitled, according to the present state of the fund, the proper order would have been to dissolve the injunction, except for the amount stated, for which, of course, the plaintiffs would be entitled to a credit on the judgment. As the answer is evasive in this respect, it was error to dissolve the injunction, for that was permitting the defendant to take advantage of his own default, for it is certain the plaintiffs are entitled to some part of the fund, and cannot be made to forfeit it by a general recrimination to the charge of fraud which the plaintiffs made against them, "that they went on to New York and purchased the notes for a mere trifle," and "must come into court with clean hands," etc.

Upon the whole, this Court is of opinion that the decretal order dissolving the injunction should be reversed and the exceptions to the answers allowed, so that upon the coming in of full answers the plaintiffs may amend by making the creditors parties. And (332) although the amendment will supersede the *ex parte* injunction heretofore granted, yet the plaintiffs may then move for an injunction upon the *equity confessed* by the answers, to wit, the amount of the dividend to which they are entitled. This will be certified.

PER CURIAM. Decretal order reversed.

WILLIAM BRANTLY v. JAMES KEE.

1. In a bill for a sequestration to protect the interest of a remainderman, it is not necessary that all the joint owners of the remainder should be made parties.

2. Where one coming in under a life tenant resides in another State and claims the whole property in slaves against conscience and equity, this without any threat, was *Held* to be sufficient ground for a remaindermen to allege an apprehension that they would be removed, and to authorize the issuing of a sequestration to restrain such removal.

3. A conveyance of "all the property I possess," where there was no apparent motive for making an exception, was *Held* to mean all that the party *owned*, as well that in remainder as that in his immediate occupation.

4. Where, by a marriage settlement, the husband was entitled to an estate for the life of his wife in slaves, and the wife to the remainder, and during the coverture the husband conveyed to a trustee, in trust for the benefit of his wife for her life, with a remainder to A. and B., his children, and after discoverture the wife elected to take the life estate under her husband's deed, it was *Held* to be against conscience for her, after disposing of the life estate, to claim the remainder also.

5. Where a deed of trust was made limiting property in slaves to certain persons, and a petition was filed in a court of chancery setting out the rights of the parties to the deed, according to its terms, and praying for the appointment of a trustee to perform the trusts as herein set out, and such trustee was appointed by the court, and gave bond to perform the trust and took the property into possession by virtue of such decree, it was *Held* that the parties to the proceeding were estopped to deny the ownership asserted in the proceeding, and that the trustee, as a privy in estate, was in like manner estopped.

6. A trustee who acquires an outstanding title adverse to that of his *cestui que trust* is considered, in equity, as having acquired it for their benefit, and cannot set up for his own.

(333) CAUSE removed from the Court of Equity of NORTHAMPTON.

William Kee made his will and died in 1829, bequeathing thereby to his wife, Anna Kee, during her life or widowhood, among other things, a negro girl Sarah, and upon the death or marriage of the said Anna he gives the girl Sarah and her increase to his "daughter, Sally Hart, and her heirs forever."

Sally Hart, during the lifetime of Anna Kee, intermarried with one Wyatt Brantly, having first made a marriage settlement, dated 29 March, 1829, of which the following extract only is necessary to the proper understanding of the case:

"The said Sarah, for and in consideration of the premises, does hereby grant, bargain, and convey unto John W. Dupree, . . . as trustee, all the estate or property which she now possesses, upon the following trust, to wit, that the said Wyatt and Sarah are to enjoy the

profits arising from the said estate, and to have the use thereof during the lifetime of the said Sarah, and at her death, she, the said Sarah, may dispose of the same in such way as she may think proper, either by will or deed of gift or other instrument of writing."

Anna Kee died about 1834, and immediately thereafter the slave Sarah and her child, Cassandra, went into the possession of Wyatt Brantly, where they remained up to the time of his death, which took place in 1842. Shortly before his death (in September, 1842) he conveyed some land and the growing crop, plantation tools, cattle, horses, hogs, furniture, etc., and the following slaves: Sarah, Ben, Anthony, Joe, Carter, Tom, and Cassandra, to one Benjamin D. Tillar, his heirs, etc., in trust to pay the debts of the said Wyatt, and then for the use and occupation of his wife Sarah during her life, and after her death to his sons William and John. This deed was acknowledged in open court by both Brantly and Tillar and ordered to be recorded.

Tillar acted as trustee for a short time, and in January, 1843, (334) an application was made to the court of chancery of Greensville County, in the State of Virginia, wherein the parties resided, by petition of the creditors of Wyatt Brantly, setting forth the appointment of Benjamin D. Tillar as trustee, and that he had sold some of the property, but that he refused to proceed further in the execution of the trust, and was anxious to be rid of it, and praying that another trustee might be appointed. Service of this petition was made on Sarah Brantly, William Brantly, and John Brantly, who all answered and professed to be satisfied with the proposed change, and thereupon a decree passed appointing George Kee trustee in place of Benjamin D. Tillar, and the said George gave bond with two sureties, payable to the court, reciting his appointment as trustee and conditioned "well and truly to perform the duties of trustee as aforesaid."

George Kee, the newly appointed trustee, took possession of the slaves immediately after his appointment and brought them to the county of Northampton, in this State, and retained possession of them until his death, which occurred in 1856.

In March, 1843, Sarah Brantly, for the consideration of natural love and affection, conveyed to the said George Kee the whole of her property, including the woman Sarah and her daughter Cassandra and the other slaves in controversy, descendants of these two, reserving to herself a life estate in the property.

Afterwards, on 14 September, 1844, the said Sarah, reciting a consideration of $1,000 paid by George Kee, conveyed to him by deed of that date her life estate in the slaves reserved in the deed of 1843.

After the death of George Kee, his next of kin had a division, by order of court, of these slaves as a part of the estate of George Kee, and

those in question in this suit (Cassandra and her two children, descendants of the woman Sarah) were assigned to the defendant as one of the next of kin, and the bill alleges that he is about to remove the
(335) same to the State of Tennessee, where he resides, claiming the absolute right to them.

The bill alleges that the plaintiff William is entitled to the entire interest in remainder, for that his brother John, to whom it was jointly limited, is dead, without leaving any child or children; also, that Sarah Brantly, the original donee, is still alive, and that before her death the plaintiff's right to enjoy the property does not arise, but in order that the same may be preserved and protected until the happening of that event, he prays for a writ of sequestration, etc.

The facts set out in the defendant's answer are substantially as stated above, except that it is not admitted that John Brantly was dead at the beginning of this suit, and it is urged that, being a necessary party, the bill in its present shape cannot be sustained. And it is denied that the defendant ever declared an intention to remove the slaves in question to the State of Tennessee or beyond the jurisdiction of the court. The defendant insists, however, that by a proper construction of the deeds above set forth, and by the division of his father's estate, he is entitled to the property in absolute right, and he admits that his residence is in the State of Tennessee.

A question arose between the parties as to the meaning of the conveyance to Dupree. It was insisted by the plaintiff that Mrs. Brantly did not intend to convey the slaves in question, as she only professes to convey the estate which she *possessed,* and that her mother being alive, she did not possess the slave Sarah. To this it was replied that Mrs. Anna Kee had, at the date of the deed, surrendered her life estate, and the slaves were in the possession of Mrs. Brantly when the deed was made. Testimony was taken as to this fact, but, according to the view of the court, the point becomes immaterial.

The order was made by the judge at chambers for the issuing of the writ of sequestration, and the same was returned by the sheriff with bonds taken for the forthcoming of the property at the death of Sarah Brantly.

The cause in this state was removed, by consent of parties, to this Court, and was heard on a motion to dissolve the sequestration
(336) and dismiss the bill.

Barnes and Fowle for plaintiff.
B. F. Moore for defendant.

PEARSON, C. J. The plaintiff alleges that he is entitled to certain slaves, subject to the life estate of Sarah Brantly, and that the defend-

ant, who has acquired the life estate under pretense that he is entitled to the absolute estate in three of the slaves, is about to carry them to the State of Tennessee, where he resides. The object of the bill is to have the slaves sequestered, so as to have them forthcoming at the death of Sarah Brantly.

We are not satisfied by the proofs that John Brantly, who the plaintiff admits was a tenant in common with him, is dead without children, but we are satisfied that he has left the State and gone to parts unknown; and for this reason, we are of opinion that the bill, which does not seek a final adjudication of the rights of the parties, but only to have the property secured, can be maintained by the plaintiff, and that John Brantly is not a necessary party. In *Brown v. Wilson,* 41 N. C., 558, a remainderman, who had but a *contingent interest,* subject to the death of the tenant for life, without having a child, was allowed to maintain a bill of this kind for the purpose of securing the property.

Where there is a reasonable ground of apprehension, the bill will be maintained, unless it appears that the defendant is entitled to the absolute estate. The defendant denies that he ever announced a purpose to carry the slaves out of the State, but he claims them absolutely; and as he lives in Tennessee, and these slaves have been allotted to him in the division of his father's estate, we are satisfied there is a ground to apprehend that he will take them out of the jurisdiction of this Court. So the question turns upon the title to the slaves.

1. Did the slaves Sarah and Cassandra (from whom the others are descended) pass to Dupree under the marriage settlement executed by Sarah Brantly (then Sarah Kee)? The words are, "all (337) the estate or property which she *now possesses.*" "Possess" is frequently used in the sense of "own," "entitled to"; and although the word "now," in connection with the fact that Mrs. Brantly's title was subject to a life estate, raises a doubt whether it was not intended to exclude the property to which she was only entitled in remainder; still the fact that there was no motive for not including in the settlement all the property or estate which she owned, inclines us to the conclusion that she did intend to convey all that she owned, in which sense "possesses" was used; so that point will be conceded to the defendant, and we will not enter into evidence as to whether the slaves had not been before that time put into her possession by her mother, the tenant for life, or whether, just before the date of the deed, they had been taken away from her.

2. There are three grounds upon which the defendant, who claims under George Kee, cannot be considered in this Court as the owner of the remainder in these slaves after the death of Mrs. Brantly:

(1) By the effect of the deed to Dupree and the marriage, Wyatt Brantly, upon the death of the tenant for life, was entitled to the slaves for the life of his wife. The effect of his deed to Tillar was to give Mrs. Brantly an estate in the slaves for her life, with a limitation over to his two sons. After his death, Mrs. Brantly elected to take under this deed and went into the enjoyment of a life estate. So the matter stands thus: Under the deed to Dupree, Brantly was entitled to the life estate and Mrs. Brantly to the remainder; under the deed to Tillar, Mrs. Brantly was entitled to the life estate and the children of Brantly to the remainder, thus effecting an exchange of the estate which was advantageous to Mrs. Brantly as she had no child. At all events, she so considered it, and after the incapacity of coverture was removed made her election, and it is against conscience and a well-established principle of equity for her or any one claiming under her, after the enjoy-
(338) ment of the life estate derived from her husband, to attempt to set up her title to the remainder under the deed to Dupree, for thereby she would defraud Brantly's children either out of the life estate or of the remainder; and to prevent this, she must abide by her election to take the life estate and let them have the remainder.

(2) Mrs. Brantly was a party to the proceedings had in the court of chancery of Greensville County, Virginia, by which George Kee was substituted as trustee in the place of Tillar. The parties in that proceeding set up title under the deed to Tillar, and it is admitted and acted upon as a *fact* that Mrs. Brantly was entitled to an estate for life and William and John Kee to the remainder. So the case comes directly within the principle of *Armfield v. Moore,* 44 N. C., 157, and George Kee, as privy in estate, is bound by the estoppel, which, in this instance, operates to prevent a fraud.

(3) George Kee, by his appointment as trustee in the place of Tillar, by the execution of a bond for the faithful performance of the duties of trustee, according to the provisions of the deed to Tillar and by taking the slaves into his possession, became invested with all the rights and duties of a trustee for Mrs. Brantly and for William and John Brantly, and when he acquired the adverse title of Mrs. Brantly under the deed to Dupree is presumed to have taken up this adverse title for the benefit of his *cestuis qui trust,* William and John Brantly, upon the well-settled principle of equity that where a trustee purchases in an outstanding adverse title he is considered as doing so, not for his own, but for the benefit of his *cestui qui trust;* and the principle applies more strongly where the title is acquired, not by purchase for value, but as a mere volunteer, by his *own act,* and not by the act of law. The correctness of this principle, and its necessity in order to prevent one who has undertaken to protect the rights of others, and by his fiduciary relation has

had the means of knowing the condition of the title, from committing a fraud and betraying his trust, will strike every one's sense of justice without further explanation, and is too plain to require the citation of authorities. The principle is under certain circumstances acted on at law: Tenant for life makes a feoffment to A. for life, (339) remainder to B. in fee; the first feoffor releases to A.; it operates "by way of extinguishment" and inures as well to the benefit of B. as A. So a disseizor makes a feoffment to two; the disseizee releases to one of them; it inures to the benefit of both; taking under the same conveyance, they are privies in estate, and the act of one in getting in the outstanding right is presumed to be for the benefit of his fellow as well as himself.

Our case is a striking instance in illustration of the principle. As soon as Kee gets possession of the slaves he brings them into this State, and thereupon turns "traitor in the camp" and instigates one of his *cestuis qui trust* to attempt a fraud upon the others by setting up and conveying to him an outstanding adverse title to the remainder after her life estate. This is not simply a constructive fraud, but actual fraud and dishonesty. Can he, or a volunteer under him, ask to be considered, in a court of equity, as having by such means defeated the rights of his *cestuis qui trust* and become the owner of the absolute legal and beneficial estate?

The sequestration will be continued, to the end that the defendant may give a sufficient bond not to remove the slaves beyond the jurisdiction of this Court and to have them forthcoming at the termination of the life estate.

PER CURIAM. Decree accordingly.

Cited: Dunn v. Oettinger, 148 N. C., 284; *Pate v. Lumber Co.,* 165 N. C., 187.

(340)

KADER BIGGS ET ALS. v. ALANSON CAPEHART.

Where a deed in trust grouped several creditors, A., B., C., and D., thus: Secondly, to pay and discharge in full the several and respective debts, bonds, etc., due or that may grow due to A., pay to B., C., and D. the several and respective debts, bonds, etc., due or that may grow due to them, it was *Held*, that by force of the words "pay in full," A. was entitled to priority over the others.

CAUSE removed from the Court of Equity of BERTIE.

The bill was filed against the defendant, as trustee in a deed of trust, for an account. The pleadings disclose the following facts: On 19 February, 1858, Richard Cox and John L. Andrews, trading as Cox & An-

drews, made a deed of trust to the defendant, one clause of which is in the following words: "Secondly. To pay and discharge in full the several and respective debts, notes, bonds, obligations, and sums of money due, or that may grow due, from the said party of the first part, for which they are jointly liable to the said party of the second part, pay to L. S. Webb, cashier of the Branch Bank of the State of North Carolina at Windsor, Kader Biggs & Co., of Norfolk, Va., and Britton, Todd & Young, of Petersburg, Va., the several and respective debts, notes, bonds, obligations, and sums of money due or to grow due thereon to them." The deed then provides that the debts due to a third class shall be paid *pro rata* if there should not be enough to pay them fully.

Alanson Capehart, the defendant in this suit, is the trustee in this deed of trust, and claims precedence of the other parties mentioned with him in the above recited clause of the deed. The deed is filed by Biggs & Co., Britton, Todd & Young, and L. S. Webb, who claim a *pro rata* division of the fund. The cause was set for hearing on the bill and answer and sent to this Court.

Winston, Jr., for plaintiffs.
Garrett for defendant.

(341) BATTLE, J. The only question presented by the pleadings for our consideration is, whether the defendant has a preference over, or is to share equally with the other creditors mentioned as the second class in the deed of trust executed for their benefit by Cox & Andrews. The clause upon which the controversy arises is as follows: "Secondly. To pay and discharge in full the several and respective debts, notes, bonds, obligations, and sums of money due, or to grow due, from the said party of the first part, for which they are jointly liable to the said party of the second part, pay to L. S. Webb, cashier of the Branch Bank of the State of North Carolina at Windsor, Kader Biggs & Co., of Norfolk, Va., and Britton, Todd & Young, of Petersburg, Va., the several and respective debts, notes, bonds, and sums of money due, or to grow due, to them."

As the funds in the hands of the defendant, as trustee, are not sufficient to pay all the debts specified in this class, the general rule that among those standing on the same footing, "equality is equity" must prevail, unless there be a clear manifestation of a purpose in the makers of the deed to give to one or more of the creditors a preference over the others. We think there is such a purpose indicated in favor of the defendant, and that the clause of the deed in question will not fairly admit of any other construction. The debts due the defendant are first mentioned, and it is declared that they are to be paid and discharged *in full,*

while the provision in favor of the other creditors is simply that they are to be paid. The counsel for these creditors insists that to pay, and to pay in full, means the same thing. That may perhaps be so when the expressions are applied to the same debt, but the former expression is manifestly stronger than the latter when applied to different debts. The sentence in which the debts due the defendant are secured is, in its meaning, a distinct one from that in which the other debts of the second class are provided for, although only separated from it in the manuscript by a comma. The repetition of the verb "to pay" shows this, as we think, very clearly, and we do not feel at liberty to disregard the words "in full annexed to that verb in the first sentence. The grantors (342) in the deed of trust thought, no doubt, that all the debts specified in the second class would be fully paid out of the effects which they had conveyed to the trustee, and they did not, therefore, provide expressly for a *pro rata* distribution among the creditors of that class as they did with respect to those of the third class as to whom a deficiency of funds was apprehended. Still a suspicion seems to have crossed the minds of the debtors, suggested, probably, by the trustee himself, that there might not be enough of funds to discharge the debts due to him and the other creditors put in his class, and it was to meet such a contingency that it was provided that, at all events, his debts should be paid in full. Being a creditor himself, the trustee very naturally, and not unreasonably, desired to have his own debts made secure in priority to all others, and, in our opinion, his purpose was accomplished by the language upon which we have commented. There must be an account and a distribution of the funds in the hands of the trustee upon the principle declared in this opinion.

PER CURIAM. Decree accordingly.

ALBERT R. SCOFIELD v. ADRIAN H. VAN BOKKELEN ET AL.

Except to stay waste or prevent some irreparable injury, the writ of injunction is only issued as ancillary to some primary equity which the plaintiff seeks to enforce by his bill.

CAUSE removed from the Court of Equity of NEW HANOVER. (343)

The bill alleges that on 10 February, 1860, Conley & Kirk, of the city of New York, being in failing circumstances, made to the plaintiff a deed of assignment of all their real and personal estate, wherever the same might be, and also all their things in action, notes and effects, in trust for certain creditors therein named; that McRae & Co. were indebted to the firm of Conley & Kirk in the sum of $808.61; that by the above-mentioned assignment, the right to this debt, in equity, passed to

the plaintiff as trustee; that, nevertheless, after the execution of the said deed, the defendant A. H. Van Bokkelen took out an attachment, returnable to the county court of New Hanover, alleging that the said firm of Conley & Kirk was indebted to him in the sum of $1,500, and summoned the said McRae & Co., as garnishees, to answer and say what amount they owed Conley & Kirk, who accordingly answered and admitted that they were indebted to the said firm in the said sum of $808.61, and thereupon a conditional judgment was rendered against the said McRae & Co., as garnishees, and the case is still pending for final judgment. The bill alleges that the indebtedness of Conley & Kirk is based upon a bill due to the defendant Spencer Van Bokkelen, of New York, who assigned the same to his brother, the said Adrian, without consideration to avoid the effect of notice, which the said Spencer had of Conley & Kirk's assignment to plaintiff, and likewise to enable the defendant to use fraudulently the remedy, by attachment, which is not given by law to a nonresident against a citizen of the State of North Carolina. The prayer of the bill is to restrain the said defendants from proceeding further in prosecuting the said action begun by attachment, and for general relief.

The defendant filed a general demurrer, and the plaintiff having joined in demurrer, the cause was, by consent, transmitted.

Baker for plaintiff.
Strange for defendants.

PEARSON, C. J. The bill is fatally defective in this: it does not set up any *primary equity in aid* of which an injunction is prayed
(344) for, but seeks merely for an injunction restraining all further proceedings at law under the attachment, so the only object is to obtain a perpetual injunction, and then the matter is to stop. Except to stay waste and prevent some irreparable injury, the writ of injunction is only granted as ancillary or in aid of some primary equity which the plaintiffs seeks by his bill to enforce.

This matter has within two or three last years been so often before us, and has been so fully explained, that we will not again enter upon its discussion or attempt any further explanation.

PER CURIAM. Demurrer sustained and bill dismissed.

Cited: Martin v. Cook, 59 N. C., 200; *Whitaker v. Bond,* 62 N. C., 227.

WILLIFORD GAY ET ALS. v. HENRY BAKER ET ALS.

A conveyance in trust for a woman and her children, she having children at the time, nothing appearing on the face of the deed to show a contrary intention, was *Held* to vest an estate in the mother and the children then born and in one *in ventre sa mare* as tenants in common, but that children born afterwards were not entitled to come in.

CAUSE removed from the Court of Equity of FRANKLIN.

The bill was filed against the trustee, Henry Baker, Jr., for an account and for a sale of the property in his hands and a division of the proceeds among those entitled, according to a deed executed by Henry Baker, Sr., on 16 May, 1819. The deed recites as a consideration, the love and affection which the donor has for Elizabeth Gay and *her children* and for Baker, and conveys to Henry Baker, Jr., a negro woman by the name of Delaney and her two children, Mary and Amy, "to have and to hold the said negroes to the said Henry Baker, Jr., his executors and administrators, for the proper use, behoof, benefit, and advantage of my daughter aforesaid, together with her children afore- (345) said, and for the security of the payment of $125, with legal interest thereon, to my aforesaid son James Baker." The deed then provides for the sale of one of the negroes for the payment of the $125, and gives overplus of the money arising from such sale, and then proceeds as follows: "The whole equitable interest in the said negroes is to belong to my daughter Elizabeth and her children in common." All the children of Elizabeth Gay that were surviving at the bringing of this suit and the representatives of such as were dead are made parties, either plaintiff or defendant, as also is the administrator of the said Elizabeth, who is now dead intestate.

The trustee, Henry Baker, Jr., answered, giving an account of his trust (upon which there is no question between the parties) and stating the fact that four of the children only of Elizabeth were born at the time of the making of the deed, and one (now Mrs. Carter) was born six months afterwards, and he states that there are conflicting claims set up by the several children as to who are entitled, the four born before 16 May, 1819 (the date of the deed) claiming the whole of the property, Mrs. Carter, then *in ventre sa mare,* insisting on the same principle, but claims that she shall come in for one-fifth, while those born after Mrs. Carter insist that they are all equally entitled after the death of their mother. The administrator of Mrs. Elizabeth Gay urges that she took with her children *in esse,* and is entitled to one-sixth part of the fund. The trustee asks the Court for a construction of the deed above set forth and for a decree which will protect him against these conflicting claims.

Two of the children who were alive at the making of the will died in the lifetime of their mother, and another question is, whether their representatives are entitled to a share. The whole of the slaves, after the sale of one for the payment of James' debt and one other for the better provision of the family, remained in the custody of Mrs.
(346) Gay and worked for the common support of the family till her death, which took place in 1858.

The several children interested answered the bill, each insisting on a construction favoring his peculiar interest in the question.

A. M. Lewis and B. F. Moore for plaintiffs.
R. B. Gilliam and J. J. Davis for defendants.

MANLY, J. The object of the bill is to obtain an account of a trust fund created by the deed of Henry Baker, under date 16 May, 1819, and to obtain a sale and distribution of the same to the persons entitled under said deed. In the accomplishment of these objects a construction of the deed is necessarily involved, and we are accordingly invoked by the pleadings to aid the trustee in putting a proper construction upon it. The trustee submits to an account, but informs the Court that Elizabeth Gay had several children *born at the execution of the deed,* one born within the ordinary period of gestation, and several *subsequent* to that period, and inquires who of them are entitled.

We have considered the terms of the deed, and conclude that the children in being at the execution of the deed, including the one *"en ventre,"* alone take, to the exclusion of the others. The payment to James of $125, which was a charge upon the fund, having been made, it will follow that the mother (Elizabeth) and the class of children designated, or their representatives, are entitled to absolute interests in the fund as tenants in common. After payment of the charge upon the fund, it was naked, or executed in trust in the hands of Baker which he might at any moment have been called upon to surrender, and it is, therefore, to be considered as a legal estate, and vests in such persons as answer the description of the donees and are capable of taking at the time.

It differs from the cases cited in the argument, viz., *Ponton v. McLemore,* 19 N. C., 285; *Chestnut v. Meares,* 56 N. C., 416, and
(347) *Coakley v. Daniel,* 57 N. C., 89. In these it will be found that the trusts were either open and executory in their nature, or there was an intention, more or less manifest in the terms of the gifts or bequests, to divide the donees into classes, making one the primary and the other the second objects of the gifts.

But in the case now before us, such is not the character of the trust, nor have we been able to gather from the terms used any intention to

give in succession to the daughter the use for life, and then to her children, in which all after-born children would have taken. The donor has taken care, indeed, to express a different purpose by declaring in one place that the daughter shall have the use, *together with* the children, and in another that the whole equitable interest shall belong to the daughter and her children *in common.*

We do not feel at liberty, however much inclined to do so for the sake of equality, to infer an intent contrary to the established interpretation of the words used. The case is analogous to and is controlled by the authority of *Moore v. Leach,* 50 N. C., 88.

Although, by a grant or common-law conveyance, nothing could be transferred directly to a child in the womb—for the reason that it could not be a party to such an instrument—yet in a conveyance to uses it was otherwise, for then the legal estate vesting in the trustee the rule of the common law was supposed to be satisfied and the use was allowed to shift so as to include a child in the womb. This was, as I understand it, an indirect adoption of the more humane and practical rule of the civil code, which regarded a child in the womb as already born for all beneficial purposes.

Dupree v. Dupree, 45 N. C., 164, is not opposed to the rule of construction here laid down, but will be found, upon examination, to be in accordance with it.

Our conclusion, then, is that Elizabeth Gay and her children born and living at the execution of the deed, and the one *en ventre sa mere* (or, if dead, the representative of such), are entitled to the absolute estate in the trust fund as tenants in common. (348)

The parties can have a decree for the sale of the real estate belonging to the fund and for an account and distribution of the entire fund according to the construction here given to the deed.

PER CURIAM. Decree accordingly.

Cited: Hunt v. Satterwhite, 85 N. C., 75; *Hampton v. Wheeler,* 99 N. C., 225; *Heath v. Heath,* 114 N. C., 550; *Silliman v. Whitaker,* 119 N. C., 93; *Wilson v. Wilson, id.,* 590; *King v. Stokes,* 125 N. C., 515; *Whitehead v. Weaver,* 153 N. C., 90; *Cullens v. Cullens,* 161 N. C., 346.

E. G. L. BARRINGER ET AL. v. JOHN T. ANDREWS ET ALS.

"An affidavit of the truth of the matters contained in his bill" is necessary to give jurisdiction of the court of equity under the statute, Rev. Code, chap. 7, and the want of such affidavit is a good ground for a general demurrer.

CAUSE removed from the Court of Equity of MONTGOMERY.

The bill was filed to subject the legacy of the defendant, under the will of Wilson Andrews, which is a remainder in slaves, etc., after the death of Mary G. Andrews, to the payment of plaintiff's debt. The nature of the debt, and how due, is set out in the bill, and various other matters are alleged, but the affidavit appended to the bill makes no verification of anything therein contained, except that the defendant John T. Andrews resides beyond the limits of the State. As this is the turning point of the case, it is deemed proper to set out the affidavit *verbatim*.

"NORTH CAROLINA—Montgomery County.

"Personally appeared before me, E. J. Gaines, clerk and master in equity in and for the said county, E. L. Barringer, who, being duly sworn, declares that the defendant John T. Andrews resides beyond the limits of the State. E. G. L. BARRINGER.

"Sworn to and subscribed before me E. J. GAINES, C. M. E."

(349) The defendant filed a general demurrer, and the cause was sent to this Court for argument.

No counsel for plaintiff.
Blackmer for defendant.

MANLY, J. This is a bill filed to attach, in equity, under our statute, certain interests in remainder of John T. Andrews, in property bequeathed to him by Wilson Andrews. A general demurrer was put in, which brings up the inquiry whether there is enough on the face of the bill to entitle the plaintiffs to the equitable relief which they seek.

The statute which gives the remedy (Rev. Code, chap. 7, sec. 26) declares that "the plaintiff shall state specially his debt or demand as near as he can, and shall make affidavit of the truth of the matters contained in his bill, according to his information and belief."

No such affidavit as is here required appears in the proceedings, and we suppose none was made. The bill contains a statement of the amount of the debt and the manner in which it accrued; the "jurat" at the foot states only that the defendant John T. Andrews resides beyond the limits of the State. That is all. There is no affidavit of the truth of the matters stated in the bill, and we think this defect is reached by a general demurrer.

This attachment in equity of property or estate that could not be reached by law is the creature of legislation, and is given only on the condition that a specific debt shall be alleged to be due, and that the allegation shall be made under oath. To give the remedy, and conse-

quently to give jurisdiction to the court, it is essential there should be a debt, and a debt sworn to be due. The willingness of the creditor to give assurance, by oath, of the justice of his claim is the ground of the bill. The oath, therefore, is not mere form, but of substance, by force of the statute.

The assertion of a demurrer, according to Mr. Adams, is that plaintiff has not, on his own showing, made out a case, and this assertion, according to our view, will reach the defect in the plaintiff's (350) bill—a defect apparent upon its face. The ordinary grounds of a demurrer are want of jurisdiction, want of equity, multifariousness, and want of parties. One of the grounds alleged in the case before us is want of jurisdiction; the verification of the debt by oath being necessary to give power to the court to take cognizance of the subject-matter.

It is not necessary, in equity, to set out specially the ground of the demurrer. The assertion of a general demurrer, that the plaintiff's case is bad upon his own showing, is sustained if, upon the trial, any ground is shown making good that position. And even when special ground is taken in the demurrer, other grounds may be shown on the trial. We are of opinion, therefore, that a general demurrer will apply to the defect in the plaintiff's case, and is fatal to it. In *Allen v. Bank,* 21 N. C., 7, which was a bill filed to recover certain lost notes, and in which a question arose as to the verification on oath of the bill, the Judge delivering the opinion of the Court says: "When a bill is brought, not for discovery merely, but also for relief, the practice of the Court generally requires that an affidavit of the loss of the written instrument should be annexed, because it is the loss which constitutes the reason for changing the *forum* and transferring to the court of equity an ordinary case of relief in the courts of law. The want of such an affidavit would be a good ground of demurrer."

What was here said is in point upon the question we are here considering. A verification on oath, in our case, is essential, because such verification of a peculiar state of facts constitutes the reason for putting into action the court of equity.

We have not thought proper to discuss another ground of demurrer, which was brought forward upon the argument, to wit, that the interest of John T. Andrews was not such as could be attached. It is not necessary in consequence of the view taken of the first ground.

PER CURIAM. Demurrer sustained and bill dismissed.

(351)

LOUIS H. McDANIEL v. JAMES McDANIEL ET ALS.

Where land was devised to A. and his heirs, with a restriction that if he died without leaving children, then to B. and C.; but if he wished to sell he should give them the preference, and provided a mode for ascertaining the value, it was *Held* that a power of alienation was conferred on A., and that B. and C. should be put to their election under the direction of the court, either to take the land in the manner prescribed, or to decline it.

CAUSE removed from the Court of Equity of JONES.

James McDaniel made his will in 1853, and shortly thereafter died. By the fifth clause thereof he devised and bequeathed as follows: "I give and bequeath to my son, Louis Henry McDaniel, the lands whereon he now lives, being a part of the Howard tract, containing all that part of the said land that lies on the left-hand side of the public road leading from Trenton to White Oak, on condition that he release all claim on my other heirs for the sum of $1,000 (the same having been paid by the said Louis H. McDaniel in part payment of the said Howard lands)." He then bequeaths an interest in certain mills, etc., and certain slaves and other personal property, to Louis, and adds, "Provided always, that should the said Louis H. McDaniel die leaving no lawful heir or issue surviving him, the said estate of lands and mills hereby devised to be equally divided, as near as possible, between my surviving sons, share and share alike. And it is my will and desire that should my son, Louis H. McDaniel, desire to sell the land and mills hereby devised, that my five or surviving sons have the offer of the purchase; and should they not agree with regard to the purchase at a fair value, then and in that case, they choose three disinterested persons, unconnected with the parties either by consanguinity or affinity, and have said lands and mills valued, and that my five or surviving sons shall purchase said lands and mills at the valuation so made, and pay for the same in yearly installments should they be disposed to do so."

The plaintiff Louis H. McDaniel alleges that he took possession of the property given him under the above recited clause, having re-
(352) leased to his said brothers, the defendants, his claim to be repaid from his father's estate the said sum of $1,000; that being desirous of making sale of the land above mentioned, he has repeatedly offered same to his brothers, the defendants, and that one of them, the defendant William, and he have agreed on a price ($14,000) as the value of the said lands, and he is willing to take the said lands at that sum, provided his other brothers would relinquish all claim to come in for the said land in case the defendant should die without leaving children, but that they refused to make such relinquishment; that he then offered it to them, singly or collectively, for $12,000, the sum which another

had offered him, but they refused to buy it, and insist that, by the terms of their father's will, any sale he may make will be defeated in case plaintiff shall die without leaving a child or children. In consequence of the defendants' refusing to buy the said land, and in consequence of this unreasonable pretension, as he deems it, he alleges that he is unable to sell the land at all, and he prays the court to put a construction on the said will of James McDaniel; and if the court shall be of opinion that the plaintiff has a power of alienation, that the defendants may be compelled to make an election, either to take the land in the manner provided by the said will, or that they may formally decline to do so, and permit the plaintiff to sell to other persons, and that the court will make such declaration of his rights under the said will, and that the same may be assured to him by a decree of this Court.

The defendants answered, professing a willingness to obtain a construction of the will of their father, but insisting that the plaintiff has no right to sell the land free from the contingency of his dying without children.

Cause set for hearing on bill, answer, and exhibit, and transmitted.

J. H. Bryan for plaintiff.
J. W. Bryan for defendant.

Pearson, C. J. The land which is the subject of the contro- (353) versy is devised to Louis H. McDaniel and *his heirs;* and if there was no other restriction than that contained in the provision, "should he desire to sell, my five, or surviving, sons shall have the offer of the purchase at a price agreed on, or to be fixed by reference to three persons chosen by the parties, at which price they may have the land, should they be disposed to take it," the case would fall under the decision in *Newland v. Newland,* 46 N. C., 463, because as by the devise he takes an estate *in fee simple,* to which a general power of disposition is incident, the attempt to restrain the right of disposition would be inconsistent with the nature of the estate, and, therefore, have no legal effect. But there is this further restriction, "Should he die leaving no lawful heir or issue surviving him, the land shall be equally divided between my surviving sons," which operates as a condition to cut down his estate. So he does not take a fee simple absolute, but a fee determinable upon his death without a child or other issue him surviving. To this determinable fee a power of disposition is not incident. On the contrary, it is settled that the taker of the first fee has not the power, by any mode of conveyance, to alien the estate so as to defeat the estate of those entitled under the limitation over. *Craig v. Myers,* 44 N. C., 169. In order, therefore, that he should have the right to sell, it was necessary for the

devisor to confer it on him, and in doing so, as a matter of course, he had a right to impose restriction, so that if the devisee died without selling the land, it would pass under the limitation over, but if he complied with the terms imposed, he might alien the land in fee simple. This limitation over, which cuts down the first estate and the restricted power of sale, brings our case within the decision in *Hall v. Robinson,* 56 N. C., 349. If one devises in fee simple, he cannot make a limitation over by way of executory devise without cutting down the first fee in order to make room for the second, for after giving a fee simple absolutely there is no part of the estate or interest left in him. So if one devises without an express limitation of the estate, and gives a general power to (354) dispose of the land, he cannot make a limitation over to a third person in case the first taker dies without disposing of the land, or of such part as he may not dispose of, for the general power confers the absolute ownership and leaves nothing in the devisor. But if one devises to A. and his heirs, the estate of A. to be void in the event of his dying without a child living at his death, the devisor still has some interest, which he may give to a third person, or by reason of which he may confer on A. a power of disposition with such restrictions as he may see proper to impose, and there is no principle of law which prevents him from doing both, as is done in our case. The limitation over and the restriction upon the power of selling show that it was not the intention to give Louis H. McDaniel a fee simple absolute. A fee, conditional at common law, furnishes an analogy. Upon the birth of issue, the tenant had power to alien in fee simple. If he did so, the entire estate passed; otherwise, it remained subject to the possibility of a reverter, and the descent was governed by the terms of the original limitation.

The bill is framed on the idea that, supposing the plaintiff not to have a fee simple absolute, but to have a determinable fee with a restricted power of sale and a limitation over to the defendants in the event of his dying without a child surviving and without selling in the manner prescribed, the defendants ought not, in conscience, to act the part of the "dog in the manger," and while they refuse to buy themselves, prevent the plaintiff from selling to any one else by throwing a cloud over his right, and thereby defeat the power of selling which the devisor conferred on him.

This equity the defendants are not able to meet, for it is evident that under the will the plaintiff either takes an absolute estate, and the limitation over to them is void; or he takes a determinable fee with a limited power of sale; and if so, it is against equity for them to interpose difficulties in the way of his exercising it with a view to take their chances under the limitation over.

It will be declared to be the opinion of the Court that the plaintiff has the power to sell, so as to pass a fee-simple estate, giving to the defendants the offer of the purchase, as directed in the will. To (355) this end, the master will be directed to inquire of the defendants whether they desire to purchase, jointly or severally; and if so, at what price. The proposal in respect to the price to be made by 1 September next; and if the parties do not agree as to the price, then the value to be fixed by disinterested persons, and the cause is retained for further directions.

PER CURIAM. Decree accordingly.

Cited: Billups v. Riddick, 53 N. C., 166; *Burton v. Conigland,* 82 N. C., 103; *Baugert v. Blades,* 117 N. C., 226; *Whitfield v. Garris,* 134 N. C., 40.

HUGH C. REEVES v. THOMAS LONG AND JOHN M. FAUCETT.

A provision in a will allowing a slave to select a master and fixing his price at $500, the slaves being between the ages of 45 and 50 years, is not against the policy of our law.

CAUSE removed from the Court of Equity of ORANGE.

William Baldwin, late of the county aforesaid, died in April, 1859, leaving a last will and testament, one clause of which is in the following words: "It is my will that my negro man Jesse to choose his own master that will pay to my executors $500, in nine months after my decease, and direct them to make title as executors to my last will and testament." The defendants in this suit are the executors appointed by this will. The testator left a large amount of personal property—more than sufficient to meet his liabilities, without recourse to the slave mentioned above. In pursuance of the license allowed him by the will, the slave selected the plaintiff, Hugh C. Reeves, as his master. Reeves applied to the defendants to make him title to the slave, and tendered to them a bond, with sufficient sureties, for the payment of the price fixed in the will, within nine months from the death of the testator. The defendants refused to make title or deliver the slave. The bill is filed by the (356) plaintiff Reeves, praying that the defendants may be decreed to deliver him the slave and convey him the title.

The cause was set for hearing on bill, answer, exhibits, and proofs, and sent to this Court.

Graham for plaintiff.
Phillips for defendants.

MANLY, J. We cannot perceive any sufficient reason for not carrying into execution the testator's will in respect to the slave Jesse.

It is certainly the policy of the law to keep the races of white and black distinct from each other, and to maintain in the governing race all needful legal authority, and secure on the part of the governed unconditional subordination and obedience. This is a necessity of the condition of things amongst us, and essential to preserve the civilization that happily exists. But we are unable to understand the force of the objection that this policy is contravened by the clause of the will in question.

The substance of the arrangement made for the slave is, that he shall be sold to a master of his own selection, at the price of $500. The power of selection and the lowness of the price are the points insisted upon as vicious in their tendencies. But to hold that these vitiate the purpose of the testator and make void his will in respect to that slave would be to exclude from the system of slavery every indulgence in its management, or at least so to hedge it about in this respect as to make it stiff and harsh, and thus impart to it an aspect it does now possess. Taken alone, the permission to choose a master cannot be considered an unreasonable license. The price fixed is not so grossly inadequate for a man between 45 and 50 years of age as to vitiate this license. It is an obvious mode of giving effect to it by widening the field of selection somewhat and making it a substantial boon instead of a mockery. Thus dis-
(357) posed of, he is not the less a slave in law. The master holds him in the same absolute bondage in which all slaves are held, and is amenable for his management. If from any sense of obligation he indulge him with liberties outside of the limits prescribed by law, the nuisance may be abated and the master punished.

We are of opinion, therefore, that the direction by the testator to his executors to dispose of the slave Jesse to the person whom he might choose, and who would be willing to pay $500 for him, is not against public policy.

We forbear to discuss the matter further as it underwent so recently at the last term of this Court full consideration in a case in all respects similar to this—*Harrison v. Everett, ante,* 163. There seems to have been proper precaution used in getting from the slave a deliberate and unbiased choice of a master, and we see no reason why the person selected (Hugh C. Reeves) should not have a decree for the surrender to him of the said slave upon the payment of $500, which he proffers to do.

PER CURIAM. Decree accordingly.

WILLIAM W. TAYLOR v. C. T. McMURRAY AND SAMUEL H. MASON.

A court of equity is governed by the statutes of limitations and presumptions in the same manner that a court of law is; where, therefore, a bill of sale of a slave, not under seal, contained a false warranty of soundness, and a bill was filed by the purchaser to restrain the collection of the purchase money, three years had elapsed between the discovery of the unsoundness and the filing of the bill, it was *Held* that the suit was barred by the statute of limitations.

CAUSE removed from the Court of Equity of MARTIN.

The bill is filed to enjoin the collection of a certain note, and praying to have it surrendered.

The facts are these: On 28 April, 1854, the plaintiff purchased (358) a negro woman and child of the defendant McMurray; at the time of his purchase, plaintiff received a bill of sale for said slaves warranting them to be "sound and healthy." Some three weeks after the sale, plaintiff discovered that the woman had a cancer on her breast, which was pronounced incurable by physicians, and of which she ultimately died. Plaintiff gave his note for $600, the price of the woman and her child. Plaintiff soon afterwards paid $300 on the note, which was credited, and the note assigned to the defendant S. H. Mason, who brought suit on it in the Superior Court of Person County. The bill prays to have the collection of the note enjoined and the note itself surrendered. The bill was filed on 16 January, 1858, more than three years from the discovery of the unsoundness.

Cause set for hearing on bill, answers, exhibits, and proofs, and sent to this Court.

Winston, Jr., for plaintiff.
Rodman for defendant.

MANLY, J. Relief in this case is barred by the statute of limitations, and we deem it unnecessary, therefore, to consider or discuss the merits of the complaint.

The complaint is based upon a false warranty contained in a bill of sale for slaves between the parties, not under seal, entered into 28 July, 1854. Its falsity was discovered within seven weeks from the date of the instrument; and this bill to enjoin the collection of the purchase money, and for relief, was filed 16 January, 1858.

It is too late. A court of equity is governed by the statutes of limitations and presumptions in the same way that a court of law is. An action of assumpsit, or on the case in tort, upon this warranty, was barred in three years from the date of the bill of sale; so we hold a bill

in equity for relief, based upon it, is barred by that lapse of time, in analogy to the statute.

The bill must be dismissed at the costs of the complainant.

PER CURIAM. Bill dismissed.

(359)

ALFRED MOYE, EXECUTOR, ET AL. v. MOSES L. MOYE AND ELBERT MOYE.

1. The word "increase" includes children, grandchildren, etc., issue of the body; where, therefore, a will gave a female slave and her child to A., and then gave the woman and her *increase* over after the death of A., it was *Held* that this bequest over included the child mentioned in the first bequest.

2. Where a testator bequeathed one of the children of a female slave to each of the children of A., and in case there should be of the children of the said slave more than was sufficient to answer the said specific bequests, then the residue to two, it was *Held* that the children of A. were entitled to choose from among the increase of the woman what slaves they would have before the residue passed to the two.

CAUSE removed from the Court of Equity of PITT.

The bill is filed by Alfred Moye, executor of James W. Moye, praying a construction of certain clauses in the will of one Cleodicia Nettles.

The controversy arises out of the following clause of the said will: "Item Third. I leave in trust to my brother, Alfred Moye, for the use of my nephew, James W. Moye, negro woman Jane and her child, Laurence, and at the death of the said James I give the said Jane and her increase to such children of the said James as may survive him, as follows: to each child one negro of the increase, should there be sufficient, and the excess, if any, I leave to be divided between my nephews Moses and Elbert Moye; and in case the said James leaves no lawful children, I leave them all to my nephews above mentioned."

The executor assented to the legacy and delivered the slaves Jane and Laurence to the plaintiff as trustee. James W. Moye died shortly thereafter, leaving a will, of which he appointed the present plaintiff executor, and leaving only one child surviving him, the complainant, Abram D. Moye, who is an infant under the age of 21, and the plaintiff Alfred Moye is his guardian.

(360) The slave Jane has had the following increase since the death of Cleodicia Nettles: Henry, Cora (since dead), and Haywood.

The plaintiff claims to hold the slave Laurence, in his capacity of executor, as part of the estate of his testator. He also claims that he has the right, as guardian of the said Abram D. Moye, to elect out of the increase of the said Jane born since the death of the said Cleodicia such child as he may deem most advantageous to the interest of his ward.

The defendants contend that the boy Laurence was only bequeathed to James W. Moye during his life, and is included in the bequest of the increase of the said Jane, after the death of the said James W. Moye, to the defendants. They also contend that the plaintiff, as guardian of Abram D. Moye, has no right to elect which one of the children born after the death of the testatrix he will take, but that by the terms of the will Laurence became vested in the said Abram D. Moye, and that he, therefore, is the one indicated to fulfill the bequest, but if this is not so, then he must take the one first born after the death of the testatrix Cleodicia, to wit, Henry.

Cause set for hearing on the bill, answer, and exhibits, and sent to this Court.

Donnell for plaintiff.
No counsel for defendant.

PEARSON, C. J. The woman Jane had no child born between the making of the will and the death of the testatrix, so the question presented in the class of cases to which we were referred on the argument does not arise. We have as an open question, does the word "increase," in the limitation over after the death of James Moye, include the child "Laurence," or is it confined to the children born after the death of the testator?

The ordinary sense of "increase," in respect to a woman, is her children, grandchildren, etc., issue of her body descendants, and we do not think the fact that one of her children (Laurence) is previously mentioned sufficient to show that the word "increase" was not afterwards used in its ordinary sense, so as to include that child as (361) well as all other children and grandchildren, etc., for when the testatrix came to make the limitation over, the word "children" was not appropriate to convey her meaning, and she adopted the word "increase," in the sense of issue of her body descendants, to save the trouble of writing "children, grandchildren, great-grandchildren," as the taker of the first estate might have lived long enough to allow time for her to have numerous descendants, which the testatrix seems to have considered probable.

This construction is supported, and, in fact, made necessary, by the last limitation over, "in case of the death of James without a child, *I leave them all* to my nephews above named." "Them all" cannot be restricted to the children of Jane born after the death of the testatrix, but must include Jane and Laurence also; in other words, Jane and her family, and the subjects of the first limitation must be the same as those disposed of by the last.

We think the plaintiff Abram Moye is entitled to the woman Jane and to *one* of her children, of which he is to have choice; he is entitled to this preference because the first limitation is given to him, showing him to be the primary object of the bounty of the testatrix, and the defendants are introduced as secondary, and are only to have what is left after he gets his portion.

The cost will be paid by the executor out of the fund, so as to bear equally upon all as all are interested in having the question settled, and it presented a fair matter of doubt.

PER CURIAM. Decree accordingly.

(362)

EZEKIEL MYERS AND WIFE, AND THE SAME AS ADMINISTRATOR OF JOHN A. LILLINGTON, v. NICHOLAS L. WILLIAMS ET ALS.

1. A bequest of slaves to a father, in trust for the use and benefit of his children, but the said father "is not to be accountable to his children for the proceeds of the labor of said negroes until the said children are 21 years of age," was *Held* to vest a present, absolute interest in the trust, transmissible on a child's dying in infancy, according to the statute of distributions.

2. A provision in a will for the emancipation of the increase of a class of slaves, to be kept in this State, such increase to be liberated as each, severally, shall arrive at a certain age, and then to be sent to Africa, without any limitation in point of time as to the recurrence of such claims for emancipation, was *Held* to be against the policy of the State, and void.

CAUSE removed from the Court of Equity of ROWAN.

The bill was filed by Ezekiel Myers and his wife, Elizabeth K., who is the daughter of the defendant N. L. Williams, and was formerly the wife of the late John A. Lillington, on whose estate they administered, and they sue, also, as the representatives of that estate against N. L. Williams, as the executor of Hon. Lewis Williams, and against his other children and against the solicitor of the Sixth Judicial Circuit of the State as the legal representative of certain negroes proposed to be emancipated by the will, praying for an account and settlement of the said estate and the satisfaction of the legacies, consisting of land and personal property devised and bequeathed in said will to the *feme* plaintiff. The matter involved as to the lands devised was settled by an interlocutory decree heretofore made, and therefore only the bequests as to the personalty were considered on the hearing at this term. The clauses of the will of Mr. Williams out of which the questions under consideration arise are as follows:

"Fourth. In regard to my negroes, my will is as follows, to wit: That all of them who are above 25 years of age shall be left to my brother,

N. L. Williams, in trust for the use of his children, now born or to be hereafter born, of the body of his present wife, Mary G. Williams; but he, the said Nicholas, is not to be accountable to his children for the proceeds of the labor of said negroes until the said children are 21 years of age, my object being that the said Nicholas should (363) use the proceeds of the labor of the said negroes to enable him the better to educate his children, as well as to support the said negroes. In the next place, it is my will and desire that all of my negroes who are under 25 years of age now should, when they arrive at 25 years of age, be emancipated and sent to Liberia, on the coast of Africa: provided they should choose to be emancipated and to be sent to Liberia, their choice or option in the matter is to be ascertained by a private examination by three justices of the peace to be appointed for that purpose by the county court of Surry. If the said negroes should not choose to be emancipated and sent to Liberia in the manner above pointed out, then they shall be held in trust by my brother, N. L. Williams, for the use and benefit of his children, now born or hereafter to be born, of the body of his present wife, Mary G. Williams; and the trust hereby delegated to him, the said Nicholas, is to be subject to the same conditions in all respects as is the other trusts concerning the negroes who are above 25 years of age.

"My reason for making the distinction between the negroes above 25 years of age and those who are under that age is, that those over 25 years would not perhaps better their condition in life, and they might be too sickly if sent to Africa, while those under 25 years of age might be less sickly and might make out better in Africa. . . .

"Sixth. The issue, or increase, of my negroes, as well of those over 25 years as those under 25 years, are all to be emancipated and sent to Liberia if they choose to go, and consent to go, to be ascertained by private examination in the manner before pointed out, after they shall arrive at 25 years of age.

"Seventh. If the laws of the State prohibit emancipation, so that my will cannot be carried into effect, then all my negroes must go to the children of my brother, N. L. Williams, now born or hereafter to be born, of the body of his present wife, M. G. Williams, and to be held by my said brother in trust for the use and benefit of his children according to the conditions of the preceding parts of this will; (364) that is, that the said Nicholas is not to be liable to the children for the proceeds of the labor of the said negroes until the children arrive at the age, severally, of 21 years, but he is at liberty to use and appropriate the said proceeds in any manner he may think best for the education and support of his children."

of distributions he is entitled to her share of the legacies, in the personalty.

CODICIL.

"If any of the negroes choose to go to Liberia as above stated they are to be hired out for one year to raise the money necessary for that purpose, and my executor witness the execution of this part of my will." Dated on the same day with the will, to wit, 21 May, 1841.

The plaintiffs insisted that the foregoing provision of the will, as to the emancipation of the slaves, was void as being against the policy of the State and as being impossible of execution according to the terms prescribed. As to them, therefore, the bill prays that the executor shall account.

The answer of N. L. Williams, who is the executor, submits to the judgment of the court in respect to the clauses of emancipation, and professes a willingness to have the desires of the testator carried into effect as fully as he may be able to do so under the directions of this honorable court, provided the same be considered valid. The only other matter in the said answer pertinent to the personal estate is this: It sets forth that the defendant N. L. Williams had a daughter, by the name of Mary Lewis, born of his wife, Mary G. Williams, who was alive at the death of the testator, but who died under age and without being married or having had child or children. He insists that by the statute

The cause was set down to be heard on the bill and answer of N. L. Williams and the exhibit and sent to this Court.

Clement and J. E. Kerr for plaintiff.
Badger, Boyden, and Fowle for defendants.

BATTLE, J. Upon the first question argued before us by the counsel we entertain no doubt. The terms of the bequest to the children
(365) of the defendant Nicholas L. Williams import a present gift, though the slaves are not to be allotted to them and put into their possession until they should respectively come of age. In the meantime the profits were to be applied towards their education, and the provision in favor of the father, that he was not to be accountable to his children during their minority, cannot have the effect contended for by the counsel for the plaintiffs, of preventing the legacy from being vested. *Anderson v. Felton,* 36 N. C., 55, relied upon by the counsel in support of the view that the legacy to each child was contingent upon the event of his living to attain the age of 21 years depended upon very peculiar language of the will, as appears not only from the opinion of the Court in the case itself, but also from the comments upon it in other cases in which it has been cited. See particularly *Devane v. Larkins,* 56 N. C.,

377. The legacy having been vested in the children of the defendant Nicholas L. Williams who were living at the testator's death, the share to which his daughter Mary Lewis was entitled devolved, upon her death, to him upon his taking out letters of administration upon her estate, and, of course, will belong to him as her next of kin.

The question of emancipation which arises upon the construction of the will is one of much more importance and difficulty. It has been ably argued by the counsel who oppose the claim of the slaves to be set free in the manner and upon the terms prescribed by the testator, and we regret that we have not been favored with an argument from the public officer who was made a party to the suit for the purpose of protecting the rights and interests of the slaves. The clauses of the will which relate to the question which we are now to consider are as follows:

"In the next place, it is my will and desire that all my negroes who are under 25 years should, when they arrive at 25 years of age, be emancipated and sent to Liberia, on the coast of Africa; provided they should choose to be emancipated and sent to Liberia, their choice or option in the matter is to be ascertained by a private examination (366) by three justices of the peace to be appointed for that purpose by the county court of Surry. If the said negroes should not choose to be emancipated and sent to Liberia in the manner above pointed out, then they shall be held in trust by my brother, N. L. Williams, for the use and benefit of his children," etc.

"My reason for making the distinction between the negroes above 25 years of age and those who are under that age is, that those over 25 years of age would not perhaps better their condition in life, and they might be too sickly if sent to Africa, while those under 25 years of age might be less sickly and might make out better in Africa."

"Sixth. The issue, or increase, of my negroes, as well of those over 25 years as of those under 25 years, are all to be emancipated and sent to Liberia if they choose to go and consent to go, to be ascertained by private examination in the manner before pointed out, after they shall arrive at 25 years of age."

The testator then provides that if the laws of the State prohibit emancipation, so that his will could not be carried into effect, the negroes should go to his brother upon the same trust as he had already prescribed for his slaves who were above 25 years of age.

The objections to the provisions in favor of the emancipation of the testator's slaves who were under the prescribed age are mainly of three kinds:

First. Because it is against the policy of our law to establish a nursery of young negroes, with a view to their being emancipated at a certain age if they should so desire.

Secondly. Because the sixth clause of the will created a perpetuity which our law abhors and will not permit to be carried into effect.

Thirdly. Because, with regard to most, if not all, the slaves embraced in the provision for the emancipation, the will cannot be carried out in the manner prescribed without great difficulty and without doing violence to the humane wishes which the testator has expressed in favor of all his slaves.

In the discussion of the first of these objections, it should be assumed as the settled law of the State that a direction contained in a will (367) for the liberation of a single slave, or of a family of slaves, at some future prescribed time is legal, and may be carried into effect by the executor or other person charged with the duty. Thus a testator, grantor, or donor may, by will or deed, bequeath or convey slaves to a person for life, and direct that at his or her death they shall be emancipated. It should, also, be assumed that the boon of freedom may be left to the election of the slaves themselves. See, among others, the recent cases of *Caffey v. Davis,* 54 N. C., 1; *Cromartie v. Robinson,* 55 N. C., 218; *Redding v. Findley,* 57 N. C., 216. It will be proper for us, also, to bear in mind what we said in *Cromartie v. Robinson,* above cited. In that case, which involved the construction of the will of the late General McKay, we used the following language: "We think proper, also, to say, in putting a construction on the will now before us, we have a single eye to the intention of the testator, without reference to the notion that courts should favor charities and lean in *favorem libertatis,* for however humane we may suppose the feeling that prompts, it is not established that public policy favors the emancipation of slaves. And although the principles of the common law look with favor upon the transition of a bondsman or villein to the state and condition of a *free white man;* yet very different considerations may be involved where the question is between the condition of a slave and that of a *free negro.*"

That the true principle of our law in relation to the emancipation of slaves is that it *permits,* but does not *favor* it, may be seen by any one who will examine the numerous cases on the subject which have come before our courts for adjudication, commencing with *Haywood v. Craven,* 4 N. C., 360, and coming down to the recent case of *Lea v. Brown,* 56 N. C., 141. In every will or deed where the Court has been able to detect a trust, open or secret, for a state of qualified slavery, in favor of slaves, it has been held to be against the policy of our law and void. "The policy which forbids emancipation, unless the freed negroes are sent out of the State, and the policy which forbids *quasi emanci-*(368) *pation,* by which particular negroes are to be allowed privileges, and are not to be required to work like other negroes, but to some extent are to have a discretion either to work or not to work, as they

may feel inclined, is fully settled by the numerous cases which have been before our Court, and is strongly enforced by the Legislature." See *Lea v. Brown,* above referred to. The grounds upon which this policy are based are manifest. It has a regard, not only to the favored slaves themselves (being thereby rendered idle and worthless), but also to other slaves, who are thereby induced to become discontented with their condition, disobedient to their masters, and unfit for the social state which is essential to the well being, the happiness, and even the very existence of both master and slave. We cannot help seeing and feeling that the provisions for emancipation in the will now before us have a necessary tendency to produce similar results. It is true that the slaves are ultimately to be carried out of the State, but that is not to be done immediately, nor as to all the slaves at any one fixed time; as, for instance, at the death of the tenant for life, but it is to be done at constantly recurring periods for perhaps a century to come. The very fact that the same person who is to have the services of the slaves until they arrive at the age when they may choose their freedom is to carry out the trust for emancipation will have a strong tendency to induce him to relax the reins of a necessary discipline, with the hope of influencing their choice of bondage for the benefit of his children. This will be an evil as long as he may live, operating injuriously not only to the favored slaves themselves, but, by way of bad example, to his other slaves and to those of his neighbors. In our opinion, the policy of allowing the prospective emancipation of slaves is carried far enough already; and while we do not feel at liberty, or even inclined, to disturb what has been settled by the adjudication of our courts, we do not feel disposed to go further and support a scheme of emancipation which is likely to be attended with such bad results as the present.

This view of the case renders it unnecessary that we should (369) consider particularly the other objections to the bequest for emancipation. One or two considerations with respect to the difficulties in the way of its practical execution will readily suggest themselves to those who pay even a slight attention to the provisions of the will. Besides the trouble and inconvenience of applying to the county court of Surry every time one of the favored slaves shall attain the age of 25 years, there will be an insuperable difficulty in every instance of a female to prevent her making a choice of freedom. In nine cases out of ten, a female of that age will have one or more very young children, which, if she elected emancipation, she would have to leave, because the executor, or person charged with the trust, would be compelled to send her to Africa within ninety days. In most cases, too, her hire for one year, which is the fund provided by the testator in a codicil to his will

for the expense of transportation, would be insufficient for that purpose. We need not, however, pursue the subject, because, as we have already said, our opinion is that the whole trust for emancipation, upon the scheme declared in the will, is against the policy of the law, and therefore void. It follows that the executor must hold the slaves upon the alternative trust indicated by the testator. A decree may be drawn upon the principles announced in this opinion.

PER CURIAM. Decree accordingly.

Cited: Whedbee v. Shannonhouse, 62 N. C., 287; *Conigland v. Smith,* 79 N. C., 304.

(370)

JAMES NUNNERY AND WIFE ET ALS. v. JAMES CARTER ET ALS.

1. Where personal property was bequeathed upon a condition which was rendered impossible to be performed, *such condition not being the sole motive of the bequest,* it was *Held* that the property vested.

2. Where personal property was bequeathed to a son, *provided he take care of his mother for her lifetime,* it was *Held* not to be the intention of the testator that the whole condition should be performed before the property vested, but that he should take an estate at once, to be forfeited on failing to perform the continuing duty.

PETITION for an account and settlement of personal property, removed from the Court of Equity of CUMBERLAND.

Henry Carter, by his last will, devised to his wife a tract of land for her life, with a remainder to James Carter. He likewise bequeathed to her for life a negro woman by the name of Phillis, and her increase, with a limitation over to his several children, excluding defendant James. He also bequeathed two slaves, a wagon, a horse and a cart to his said wife during her natural life, and then "to be James Carter's, provided he take care of his mother; if not, to be whose that does take care of her."

He gave to each of his children, besides the bequests mentioned, substantial legacies under the will, but the amount or value of none of them is stated in the pleadings.

Elizabeth Carter, the wife of the testator, died in the lifetime of the testator, and the plaintiffs contend that the two slaves, wagon, etc., were given to James upon a condition precedent, which being rendered impossible by the death of the tenant for life, the property never vested in him, but remains undisposed of and subject to be distributed as intestate property. This is the sole question in the case.

C. G. Wright for plaintiffs.
Fowle for defendants.

BATTLE, J. The question presented for our determination in- (371) volves the construction of the first clause of the will of the testator Henry Carter, and it is, whether the legacy therein given to James Carter depended upon a condition precedent, and was lost because the condition became an impossible one before the death of the testator. The counsel for the plaintiff contends strenuously for the affirmative, while the counsel for the defendant James Carter insists that the condition was a subsequent one, or that the legacy was intended by the testator to be vested, subject to the charge that the legatee should take care of his mother.

In the consideration of this question, it cannot be denied that the condition is, in form and appearance, precedent to the vesting of the legacy; but we learn from the highest authority that when such conditions are at first, or afterwards become, impossible, the rule applied to bequests of personalty is different from that which governs devises of realty. Thus, in 2 Williams Executors, 786, it is said that, "With respect to conditions precedent which are impossible, a different rule is applicable to bequests of personal property from that which is prevalent respecting devises of realty. By the common law of England, if a condition precedent is impossible—as to drink up all the water in the sea—the devise will be void; but by the civil law, which, on this subject, has been adopted by the courts of equity, when a condition precedent to the vesting of a legacy is impossible, the bequest is single—that is, discharged of the condition—and the legatee will be entitled as if the legacy were unconditional." It is admitted that there are exceptions to this rule of the civil law, as appears from what Mr. Williams says further on in the same page: "If, indeed, the impossibility of the condition were unknown to the testator, as where a legacy is given on condition that the legatee marries the testator's daughter, who happens to be then dead; or where the impossibility arises from a subsequent act of God, as if she be living at the date of the will, but dies before the marriage can be solemnized, the impracticability of the performance will be a bar to the claim of the legatee, in cases, at least, such as those mentioned, where the performance of the condition appears to be the motive of the bequest."

1 Roper Legacies, 505, 506, lays down the law in substantially the same terms, with this difference, however, as to the excepted (372) cases of the civil law, that the legacy will be void only where the impossible condition is "the *sole* motive of the bequest." Applying these rules to the case now before us, the inquiry is presented: Was the taking care of his mother the sole motive of the legacy to James Carter? We are clearly of opinion it was not. The testator made provision in his will, more or less, for all his children, but whether the portions were equal we are not informed. Of the property given to his wife for life,

the testator directs that a part should be sold and divided among the other children, leaving his son James the remaining part upon the condition of his taking care of his mother. She was not to be taken care of out of the property, for that was already given to her for life, and nothing is stated, either in the will or the pleadings, to show that she needed anything more than the ordinary care and attention due from a son to his mother. The motive of the legacy to James was doubtless, in part at least, the desire of the testator to provide for his son as he had provided for his other children, and it was not intended that he should lose the legacy if his mother should need his care.

We have hitherto considered the condition as if it were a single act, to be done or omitted at once, like the case of a legacy to one provided he should marry the testator's daughter mentioned in the works to which we have referred; but, in truth, it is a continuing condition, which might require the performance of many acts during a long series of years. Had his widow survived the testator, his son James was to be charged with the care of her during her whole life, whether long or short. We cannot believe the testator intended the legacy to remain in a state of contingency during all that time, but he designed it to become vested at once, subject to be forfeited when his son should fail in the continued performance of the condition. That condition, therefore, though in form and appearance a precedent one, is in reality and legal effect (373) a subsequent condition, and as such could not, by becoming an impossible one, prevent the legacy from taking effect. So all the authorities agree, as will be seen by reference to those standard authors which we have already cited. See, also, *Darley v. Langworthy,* 7 Bro. Par. Cas., 177.

PER CURIAM. Decree accordingly.

Cited: Lefler v. Rowland, 62 N. C., 144.

Dist.: McNeely v. McNeely, 82 N. C., 186; *Burleyson v. Whitley,* 97 N. C., 298.

WILLIAM HOLLISTER, ADMINISTRATOR, v. SITGREAVES ATTMORE ET ALS.

1. Where a father joined in a deed with his sister, giving to certain of his children property that had been intended for them by another sister, whose will to that effect failed to be executed from accident, the father and sister being the next of kin and sole distributees of the deceased sister, it was *Held*, that in the distribution of the father's estate, these children were not bound to bring in this property as an advancement.

2. Where things given by an intestate father to his daughters were such as were needed on their starting in life, and were calculated to aid and advance them, there being nothing to show that they were not intended as advancements, it was *Held* that they must be so considered.

CAUSE removed from the Court of Equity of CRAVEN.

The bill is filed by the administrator of George S. Attmore, asking the direction of the court in the distribution of the personal estate of the intestate. He states, as difficulties in the way of a settlement, that his three daughters—Hannah (now the wife of William H. Oliver), Sarah (the wife of Robert S. Primrose), and Rebecca Attmore—claim to hold certain articles of household furniture as gifts from the intestate in his lifetime, and that they ought not to bring them into hotch-pot. Hannah, on the death of her mother several years ago, took charge of the household affairs of her father and managed the same, at his request, until her marriage; and while so residing and managing his business, he gave her a bed and bedstead, a wardrobe, two bureaus, and a (374) washstand, being furniture in the chamber which she occupied. To his daughter Rebecca, who always resided with him, her father gave a bedstead, bureau, wardrobe, and washstand, furnishing it for the chamber which she occupied; and to Sarah, on her intermarriage with the defendant Primrose, he gave a set of bedroom furniture, consisting of wardrobe, bedstead, washstand, bureau, chairs, etc., and states that he is doubtful as to his duty in the premises, and desires a declaration of the court for his protection. He likewise sets forth that the intestate, in his lifetime, conveyed by deed a number of slaves and other property to Sitgreaves Attmore, his son, which he claims to hold without bringing the same into hotch-pot, under the following facts: Miss Sophia E. Attmore, a sister of the intestate, had prepared the draft of a will for the disposition of her property, in which she gave to the defendants Hannah and Sarah each five shares of bank stock; to her sister Mary R. Attmore $1,000; to some more distant relations smaller legacies, and the bulk of her estate to her nephew, the defendant Sitgreaves Attmore, which draft she showed to the intestate, desiring to execute it as her will; the latter, who was an attorney-at-law, took the paper for the purpose of putting it into a more formal shape, and did so, observing the exact bequests as contained in the draft, but his sister had become too ill to execute the will when it was prepared and brought to her, and she died without ever having done so. The intestate George S. Attmore and his sister, Miss Mary R. Attmore, were the next of kin of Miss Sophia Attmore, and as such entitled by the statute of distributions to all her estate. They agreed that the desires of their sister should not be defeated by the accident which had occurred, and they joined in a deed conveying to the defendant Sitgreaves all the property their sister had attempted to bequeath, in trust, to dispose of the same in exact accordance with the provisions of the script which the intestate had prepared, which provisions are recited in said deed. The defendant Sitgreaves administered on his aunt's estate, and made the distribution of it according to (375)

the terms of the deed above recited, paying to the several persons designated the several sums, and delivering to them the specific property as therein provided, and retaining the residue for himself. The question is as to the property thus conveyed to him by his father, whether he is bound to account for the same as an advancement; and the same question occurs as to the defendants Hannah and Sarah, to whom the bank stock was given by the deed. The answers of the defendants do not vary the above statement. The cause was set down to be heard upon the bill and answers and sent to this Court.

J. W. Bryan for plaintiff.
Haughton and Green for defendants.

PEARSON, C. J. An advancement is a gift by a parent to a child of a portion of his estate, in anticipation of the whole or a part of the share to which the child would be entitled at the death of the parent, under the statute of distributions, in the event of his dying intestate.

In respect to the gifts of the several articles of furniture made by the intestate to his two daughters, Rebecca and Sarah, there is nothing to show that he did not intend them for advancements. Such things are needed by daughters when they start in life, and the presumption is the parent intended to aid or advance them by those gifts. In respect to the gift of similar articles to his daughter Hannah, the circumstance that she continued after her marriage to live with her father and took charge of his house and household affairs (his wife being dead), for aught that appears, was an arrangement mutually convenient and agreeable to the parties, and is not sufficient to bring her case within the principle laid down by Winburn, part 3, sec. 8, pp. 28, 234: "If a son has deserved a good turn at his father's hands, this is no advancement, but a recompense of that which was formerly deserved," so it must also be treated as an advancement.

(376) The gift made to his son Sitgreaves by the deed executed by the intestate and his sister Mary Attmore stands on a different footing. There is a well-established principle of equity which prevents it from being treated as an advancement.

Where creditors compound with a debtor and agree to release their debts upon his paying, say, 50 cents in the dollar, if one of them has taken from the debtor a covenant to pay the full amount of his debt, equity does not permit the covenant to be enforced on the ground that it is a fraud upon the other creditors, who were induced to enter into the arrangement because they supposed all did so. So a secret agreement in fraud of the relations of one of the parties to a marriage by which a part of the fortune paid is to be received back will be relieved against

in equity. Adams Eq., 180. Upon the same principle, it is clear that if the intestate had, before executing the deed in question, taken from his son a covenant to pay back to him his share of the property conveyed by the deed, equity would not have allowed the covenant to be enforced on the ground that it was in fraud of the intention of the sister, who was induced to give her share because she supposed that her brother was likewise giving his share, and her object in joining with the brother was to give effect to the intended gift of their deceased sister, from whom the property was derived.

The effect of treating the property conveyed by this deed as an advancement by the intestate to his son is precisely the same as if the son had paid his share to the intestate in his lifetime, so as to let it devolve as a part of his estate, for the estate is made just that much greater, and each child's part is just that much more; and the naked question is, shall that be done by operation of law which equity would not have permitted the parties to do directly? Surely not.

There is this further consideration: Miss Mary Attmore provides in the deed for the payment to her of the $1,000 which the deceased sister intended to give to her, showing that her object was to carry precisely into effect what was known to have been the wishes of their deceased sister, and leading to the inference that if she had supposed (377) her brother was to take back his share, either directly or indirectly, by having it treated as a part of his estate after his death, and thereby disappoint the intention of the deceased sister, she would have kept her own share, to do with it as she pleased.

The bank stock which is given by the deed to Hannah and Sarah, two of the daughters of the intestate, evidently stands on the same footing with the gift to his son and cannot be treated as advancements, the intention being that they should receive this stock, not as a gift from their father and Aunt Mary, but should take it in the light of a gift from their deceased aunt. No one can read the deed and fail to see that such is the true meaning and intent, and to feel gratified because there is no principle of law to interfere with the praiseworthy purpose which actuated both the brother and sister in executing the deed.

PER CURIAM. Decree accordingly.

Cited: Thompson v. Smith, 160 N. C., 257.

WILLIAM D. WYNNS, EXECUTOR, v. ABRAM BURDEN ET ALS.

Property undisposed of by will must be applied in payment of debts before legacies charged with the payment of debts can be subjected.

CAUSE removed from the Court of Equity of BERTIE.

The bill is filed by the plaintiff, as executor of George Wynns, praying the direction of the court as to his duty arising under certain clauses of his testator's will, which, among other devises and bequests, contains the following: "I give and bequeath unto my son William D. Wynns all the land I bought of Spivey's heirs, lying on Cashie Swamp; all I bought of Joseph Pugh's heirs, lying on Cashie Swamp; all the
(378) lands I bought of Barbara Ward, adjoining the land I bought of Joseph Pugh's heirs and others; also my Outlaw Mill and all her waters and timbers, and all my negroes, both old and young, which I have not lent or given away, that I hold in possession, to him and his heirs and assigns forever, after my just debts are paid. I also leave to be sold to pay my debts all the lands I have not lent or given away, also everything else which belongs to me at my death of any description that I have not given away." There were other specific bequests in the will. The testator left two notes undisposed of in his will, amounting, together, to $4,000; also other property to the amount of $800, making in all the sum of $4,800 undisposed of. The liabilities of his estate amounted to about $3,800.

The defendants in this suit, who are the next of kin, contend that these debts owing by the estate shall be paid out of the negroes bequeathed to the plaintiff, or, at any rate, that they shall contribute ratably with the notes and other property undisposed of by the will. The plaintiff contends that the undisposed of property be first applied in the payment of debts.

Cause set for hearing on bill, answer, and exhibits, and sent to this Court.

No counsel for plaintiff.
Winston, Jr., for defendants.

PEARSON, C. J. It is a general rule that any fund which is not disposed of by a testator shall be applied to the payment of debts before property which is given by the will can be subjected; in other words, a legatee is preferred to those claiming an undisposed of residue, for he is an object of the testator's bounty, whereas they take by act of law simply because, as it is not given away, and there are no debts to which it can be applied, such residue would otherwise be without an owner or remain in the hands of the executor.

In our case, the words, "after my just debts are paid," which (379) are added to the gift of land and slaves to William D. Wynns, had the legal effect of subjecting the property given to him to the payment of debts in exoneration of the property which is given away by the other clauses of the will, but not in exoneration of the property which is not given away. On the contrary, the appropriation of all the land and everything else of any "description that I have not lent or given away," to the payment of debts, makes that the primary fund, to the exoneration of the property given to William D. Wynns, in pursuance of the principle above stated, no other disposition being made of this residuary fund.

Should there be a surplus of this fund after payment of debts, it is settled that the distribution among the next of kin will be made without reference to advancements.

PER CURIAM. Decree accordingly.

THOMAS J. LEA ET ALS. v. THOMAS J. BROWN, EXECUTOR.

1. An executor is not chargeable with a sum of money which the testator had allowed his slave to acquire, and which had been loaned out to an individual and a note taken from him for the sum by another individual, payable to such individual for the benefit of the slave, because the executor had no remedy to collect it either in law or equity.

2. *It would seem* to be against the policy of the law for a master to allow his slave freedom and privilege to work and traffic *in this State*, to the extent of acquiring so large a sum as $1,500.

CAUSE removed from the Court of Equity of CASWELL.

The bill was filed by the residuary legatees against the executor of the will of Nathaniel Lea for an account of the funds in his hands and for the payment of their legacies; and on the coming in of the answer, a reference was made to Mr. McGehee, as commissioner, to state (380) an account of the funding the hands of the executor, distributable under the residuary clause of the will, and having reported, an exception was taken to a charge of $1,560 made against him on account of money in the hands of T. D. Johnson belonging to Milly, a slave of the testator, for which Dr. N. M. Roane held his note, payable to himself, which is thus explained in the deposition of Dr. Roane: "About 1 March, 1855, and during the last illness of Mr. Nathaniel Lea, I was at his house on a professional visit, and he remarked that his servant Milly had some money which she had accumulated by selling for years, with his permission, surplus articles from his premises, such as fowls, butter, ice

cream, etc., and by manufacturing and selling various articles of bedclothing, which he wished me to take charge of and loan out, seeing that she had the benefit of the proceeds thereof. At first I declined, but upon the request being repeated with more earnestness, I consented to do so. In reply to the question by her master how much money she had, Milly stated that she had already several hundred dollars in the hands of Mr. Thomas D. Johnson, and that she had been collecting some other debts, amounting in all to eleven or twelve hundred dollars. The money did not pass through my hands, but was carried by her (I presume) to Mr. Thomas D. Johnson, a merchant, to Yanceyville, who shortly thereafter handed me his individual note, payable to myself, for $1,200, with interest from 1 January, 1855, bearing date 2 March, 1855, which bond I still have in my possession." The commissioner's report showed that at the time of taking an account, the accumulated interest was $360, making the whole sum $1,560.

To this charge the executor excepted, and the cause was heard at this term on the exception.

Morehead for plaintiffs.
B. F. Moore and Hill for defendant.

PEARSON, C. J. The exception for that the commissioner has charged the defendant with $1,560, the sum placed by slave Milly in the
(381) hands of Thomas D. Johnson, is allowed. This is not a debt due to the testator, and the executor had no means of collecting it, either at law or in equity. If the dealing of the slave was lawful, that, of course, ends the matter so far as the executor of the former master is concerned. If it was unlawful, as against the policy of the law, neither a court of equity or of law will aid in the matter; so the executor could not have collected the fund which Milly had been permitted to accumulate.

How the question will be as between the trustee Roane and Johnson, who has executed to him his bond for the amount, this Court is not now at liberty to decide. It differs from the case of *White v. Cline,* 52 N. C., 174, in two important particulars: In that case *the slave earned the money in the State of California;* in this it was earned in *North Carolina,* so it may be a question whether the dealing does not come within the mischief intended to be prevented by our statutes forbidding slaves from hiring their own time or being allowed to go about and work, or not work, as they see proper. In that case, the money was under the *control of the master,* and the Court say, "As long as the master keeps the actual as well as the legal control of the fund, it can no more endanger the public safety than any other portion of his property." In this the fund

is in the hand of a stranger, and neither the former master or his personal representative, or, as we presume, the present owner of the slave, has any control over the fund.

This Court has in several cases not only recognized the right of a master, but treated it as commendable, to adopt a system of rewards by which a slave is allowed a half or a whole day, every time "the crop is gone over," to work a *patch of cotton, corn,* or *watermelons,* and the like, and to sell the proceeds, so as to make a little money with which to buy small amounts of luxuries—sugar, coffee, tobacco, etc., and to indulge a fancy for "finery in dress," for which the African race is remarkable; but when it comes to an accumulation of $1,500, the (382) question is a very different one, and other considerations are suggested.

The privileges allowed a slave, in order to enable him to acquire that amount of money extra, must necessarily in some degree run counter to the policy of the statutes by which slaves are not to be allowed to hire or to have the use of their own time. The evil effects of allowing them to own property, such as hogs, cattle, etc., which induced the statute, Rev. Code, chap. 87, sec. 20, by which the property is forfeited to the wardens of the poor, apply in some degree to so large a sum of money invested on interest, and is certainly calculated to make other slaves dissatisfied because they are not allowed the same degree of freedom and privilege; and should such a thing often occur, it would give rise to a kind of trust of which the courts of equity cannot take notice and enforce. See *Barker v. Swain,* 57 N. C., 220. So it would depend on the honesty of the particular individual in whose hands the funds were placed, either to let the slave have the fund or to dispose of it as he might direct, or according to his will or dying request, or appropriate it to himself. Transactions leading to such results are certainly not calculated to promote good morals, and should the evil become one of common occurrence may call for some legislative enactment.

PER CURIAM. Exception allowed.

Cited: Heyer v. Beatty, 83 N. C., 290.

SARAH C. LEGGETT v. A. H. COFFIELD, ADMINISTRATOR, ET ALS.

1. Where there is a statute of limitations at law, which furnishes an analogy, a suit in equity *in pari materia* is barred by it.

2. Where, therefore, a married woman was entitled to property by a marriage settlement, which was sold and conveyed by her trustee and her husband

during her coverture, it was *Held* that she was barred after the lapse of three years from the death of her husband from bringing suit against the purchaser.

(383) CAUSE removed from the Court of Equity of MARTIN.

The plaintiff alleges that on the eve of a marriage with William B. Leggett, to wit, on 10 January, 1839, she conveyed to Charles Robinson two slaves, Conda and Warden, with a trust and proviso, that if her intended husband should die first, the title to the said slaves was to be conveyed to her; that about a year after the marriage (21 December, 1839) she was prevailed on by *much persuasion* to join with her husband and the trustee in a conveyance of these slaves in absolute right to one Brown Coburn for $600, which was paid to her husband and improvidently spent, and that she was not privily examined; that after the execution of the deed aforesaid, Coburn, who had full knowledge of the plaintiff's equity, took the slaves into his possession and held them adversely as his own till his death in June, 1859, and that the defendants, who administered *cum. tes.* on his estate, have continued the possession, claiming in the same manner (adversely); that her husband, William B. Leggett, died in 1855, insolvent, and no administration has been taken on his estate; that Coburn, by his will, gave these slaves to the defendant Whitfield, who threatens to remove them from the country.

The prayer of the bill is for a sequestration and for a reconveyance of the property.

The defendants demurred, alleging as one of the grounds the length of time from the death of Leggett to the bringing of the suit, and insisted that the statute of limitations applied to the case, and barred the plaintiff's right of recovery.

Fowle for plaintiff.
Winston, Jr., for defendant.

PEARSON, C. J. The fact that plaintiff united in the execution of the bill of sale with her husband and the trustee was inoperative and of no effect by reason of her coverture, consequently, at the death of her husband, she had a clear equity to convert Coburn into a trustee for her, on the ground that he purchased with notice. But her equity as (384) against Coburn and his personal representatives is barred by the statute of limitations, as her suit was not commenced for more than three years after her right accrued, during which time they held the slaves adversely, and no fact is alleged to bring her within the savings of the statute.

The counsel for the plaintiff insisted that the case did not fall under the statute of limitations, but was embraced by sec. 19, chap. 65, Rev.

Code, which raises a presumption, after ten years, of an abandonment of a right of action or "any equitable interest or claim." In this he is mistaken. The distinction is this: where there is a statute of limitations at law which furnishes an analogy, a suit in equity is barred by it. If there be no statute to furnish an analogy, the case then rests on the statute raising a presumption; for example, a bill for a specific performance of a contract under seal rests on the statute raising a presumption, because there is no statute of limitations at law to furnish an analogy. But in our case there is a statute of limitations which not only bars an action at law for a slave after three years adverse possession, but gives the adverse holder a good, indefeasible title, and it falls within the principle of *Taylor v. Dawson,* 56 N. C., 86, and *Whitfield v. Hill, ante,* 316, where, in the case of land, seven years adverse possession under color of title was held to be a bar to a bill in equity seeking to enforce a right in equity to convert the party into a trustee.

PER CURIAM. The demurrer sustained and bill dismissed.

Cited: Johnson v. Prairie, 91 N. C., 163; *Summerlin v. Cowles,* 101 N. C., 478.

(385)

ROBERT FAIRBAIRN v. GEORGE FISHER AND THOMAS WILLIAMS.

Where there was no contest about the probate of the will of a testator, and his estate, amounting to $30,000, was easily collected, requiring few suits, and there was no extraordinary difficulties in the management of the estate, it was *Held* that $1,200 paid out in attorneys' fees, over and above $100 paid for particular services by other attorneys, was apparently unreasonable, and should not have been allowed by a commissioner without proof in explanation of the nature and propriety of the charge.

CAUSE removed from the Court of Equity of CRAVEN.

The bill was filed to recover from the defendants, as executors of Thomas Fairbairn, the legacies bequeathed to the plaintiff, which embraces the whole residue of the estate after paying some pecuniary legacies. The bill also contained allegations of misconduct in the executors, on which was based a prayer for their removal and the appointment of a receiver, and showed an angry hostility between the two executors, but which, having been disposed of on an interlocutory branch of the case (*Fairbairn v. Fisher,* 57 N. C., 390), need not be further noticed. On the coming in of the answers, it was referred to Mr. F. C. Roberts, the clerk and master of the court of equity of Craven, to take an account of the estate in the hands of the executors, who made a report, to which the parties filed exceptions, but it is only deemed necessary to notice one of them. He reported:

Amount of sale of goods on hand		$11,035.63
Cash from other sources		18,327.02
Total of debits		$29,362.65
Debits of testator	$5,930.46	
Amount paid attorneys	1,308.59	
Other charges of administration	464.95	
Commissions	1,880.12	9,584.12
Clear balance in their hands		$19,778.53

The plaintiff objected to the allowance of so large an amount of attorneys' fees. The facts were that, in the administration of the (386) estate, the executors disagreed in the conduct of the business, and in the progress of the cause they mutually criminated each other with maladministration and wasting the assets, and with bad faith in the business. Fisher paid two gentlemen of the bar, one $400 and one $300, and Williams paid two gentlemen $300 each, and one $8, making in all $1,308, which was excepted to. There were divers other payments of fees to other gentlemen, and to some of the same for specific services amounting to $104, which was not excepted to. It was admitted that these gentlemen had much trouble and responsibility in contesting this matter, but it appeared that these difficulties arose chiefly between themselves, and their dissension was alleged as a ground for an application to remove Fisher from the office, which he resisted with much energy, and accused his coexecutor of instigating this charge against him. *Fairbairn v. Fisher,* 57 N. C., 390. It was insisted in this Court that the estate ought not to bear the burden of these heated contests brought about by themselves, and that the allowance, on the face of it, was unreasonable.

McRae, Hubbard, and Stevenson for plaintiff.
Badger, Haughton, and J. W. Bryan for defendants.

PEARSON, C. J. The plaintiff's exception, because of the allowance of credits to the amount of $1,200 paid to four gentlemen of the bar for counsel fees, viz., their receipts for $300 each to three attorneys—one receipt for $200 to another attorney and one receipt for $100 paid to one of the first three attorneys.

It was insisted by the counsel for the defendants that as there was no evidence in respect to these vouchers, the Court should presume the disbursement reasonable and proper. The commissioner, it seems, has acted upon this presumption in allowing these vouchers, but the Court takes a different view of the subject.

Besides commissions, an executor or administrator is allowed (387) to retain "for necessary charges and disbursements in the management of the estate." Rev. Code, chap. 46, sec. 38. There is no doubt, among the necessary charges, reasonable fees paid to counsel are embraced. This construction accords with general usage, and in *Hester v. Hester,* 38 N. C., 9, an exception, because of an allowance of a counsel fee of $50, was overruled. So, in *Love v. Love,* 40 N. C., 201, an exception because of an allowance of $39 paid attorneys was overruled, with a remark by the Court, "because the plaintiff has failed to show that the charges were improper or unreasonable."

In our case, the statement of the condition of the estate "speaks for itself," and calls for explanation on the part of the executors, who claim a credit for so large an amount. The testator was a Scotch merchant who died in 1857, in New Bern, leaving a stock of goods on hand worth some $12,000, and other effects consisting of money invested, notes, book accounts, etc., making an estate of some $30,000. A statement made out by Mr. Freeman, by the direction of the court from the papers in the cause, shows this state of things:

Amount of sale of goods on hand		$11,035.63
Cash from other sources		18,327.02
		$29,362.65
Debts of testator	$5,930.46	
Amount paid attorneys	1,308.59	
Other charges for administration	464.95	
Commissions	1,880.12	9,584.12
Exclusive of interest		$19,778.53

Deducting $108.59 paid to attorneys for special service in collecting debts, which is not excepted to, leaves $1,200, which, in our opinion, calls for explanation, particularly as there was no contest about the probate of the will, no suits in reference to claims against the estate, and only a few actions were necessary to collect in the (388) estate, for which special fees are allowed.

For the purpose of advice in the administration of the estate, *one* attorney would seem to be enough; certainly, fees paid to *four* attorneys for that purpose is not "a necessary charge or disbursement in the management of the estate." So in respect to the amount, $1,200 cannot be a *necessary charge* in the management of the estate. Indeed, the receipt for $100 purports, on its face, to have been a fee for defending one of the executors (Fisher) against a charge of maladministration and resisting an effort to remove him from the executorship, or require him to

give bond. So that was not a "charge in the administration of the estate." The other four receipts are generally for professional services and advice, but we presume the receipts for so many lawyers, and so large an amount of fees, originated not in what can be considered the *management of the estate,* but, in a great measure, from bitter misunderstanding between the two executors and the litigation which grew out of their quarrels.

This exception is allowed. A majority of the Court are of opinion that a credit of $100 should be given to each executor to cover the charge of counsel fees in addition to the $108.59 not excepted to.

The account must be reformed in reference to this exception.

PER CURIAM. Decree accordingly.

Cited: Kelly v. Odum, 139 N. C., 280.

(389)

DIBBLE AND BROTHERS v. ALLEN JONES.

Where the purchaser of an infant's land from him brought a bill to compel a performance of the agreement, which was in writing, on the ground that he, in combination with his father, fraudulently represented himself to be of age, and it appeared that the purchaser had notice that there was great doubt as to the seller's age, and it appeared also that the bargain was a bad one on the part of the infant, who was under the control of his father, and that the latter assumed the whole control of the negotiation and received the benefit of the price, the court refused to compel a specific performance.

CAUSE removed from the Court of Equity of LENOIR.

On 5 May, 1856, the defendant attempted to convey to plaintiffs, by deed, a tract of land in Lenoir County, described by metes and boundaries, as alleged in the bill, for a valuable consideration, and a paper-writing in the form of a deed of bargain and sale was signed by the defendant, but a seal, which was necessary to give the paper validity as a deed, was accidentally and inadvertently omitted to be affixed. The consideration expressed in the said paper-writing was $450, which was then and there paid to the defendant in one buggy at $150 and one other buggy at $115, one note on Fred. Jones for $20, one do. on A. F. Walters for $50.50, one do. on C. W. Holland for $20.69, one do. on Jesse White for $8.15, one do. on Stephen Hines for $60.67, one do. on W. Gay for $13.40, and $1.23 in cash, making in all the said sum of $450. The plaintiffs in their bill allege that after the negotiation for the purchase of this land was begun, they were informed that the defendant was under age, and fearing it might be so, they had resolved to abandon the further prosecution of the trade, when the defendant, with his father,

one Bryan Jones, came to one of the plaintiffs, Franklin Dibble, and the said Bryan, in the most positive manner, in the presence of the defendant, assured him that his son had been of full age ever since the preceding August, and to give color to such assertion, exhibited, in the presence of the defendant, a small Testament, on a leaf of which were recorded the names and ages of the said Bryan's children, and among them the name and age of the defendant, from which it (390) appeared that the defendant was of the age represented by the father, and the said Bryan assured him further that those entries had been made by him, and were true; that the defendant heard all this and assented to it, and that, confiding in their representations, the bargain was closed as above stated; that if it be that the defendant was not of full age, there was, between the defendant and his father, a fraudulent combination to impose that belief on the plaintiffs and cheat them out of their property. The bill further states that the defendant, availing himself of the defect in the deed, is asserting his right to the land, and is trying to sell it.

The prayer of the bill is that the defendant be enjoined from conveying the land to any other person, and that he be compelled to make title to the plaintiffs. From the further pleadings and the proofs, it appears that the defendant was, on the day stated, not of the age of 21 years, but would be in the ensuing August; that the father, who was a reckless and improvident man, and exercised an arbitrary control over the son, was the active agent in bringing about this trade, and received the buggies and notes and used them for his own purposes, and wasted the proceeds of them, so that very little ever came to the hands of his son, the defendant.

The cause was set down for hearing on the pleadings and proofs and sent to this Court by consent.

No counsel for plaintiffs.
J. W. Bryan for defendant.

MANLY, J. The bill, although of doubtful frame and object, seems to be filed with a view either to get the purchase money back or to get a title for the land in question. The equity for this alternative relief is based upon one of two grounds: First, that defendant was of age, and ought to be made to adhere to and perform his contract; or, second, that he is not of age, but fraudulently represented himself to be so, whereby complainant was entrapped, and, therefore, defendant (391) ought to be constrained either to pay or to make title.

With respect to the first ground, we are entirely satisfied that the proof is against the complainant. The defendant was under age at the

time of the contract of sale, as proved by his uncle and aunt and by other corroborating evidence, so as to leave no doubt of the fact. Such equity, therefore, as depends upon the defendant's being of full age is unsupported, and falls.

The remaining equity which rests upon the allegation of a fraud is not left by the proofs upon any satisfactory footing. The principal negotiator in the transaction complained of was the father of the defendant, who, it seems, was a profligate and spendthrift, and who exercised an arbitrary control over his son. He asserted the son of age. The uncle and aunt of the youth had informed the complainant that he was not of age, yet the negotiation is still carried on.

At the closing interview the defendant is present. The inquiry still is, whether he is of age. The father asserts it and the son acquiesces, or, according to one witness, repeats the assertion. A leaf from a book with names and ages inscribed is exhibited by the father, and the bargain is closed. The purchase is made with two buggies, a lot of small notes, and $1.23 in cash; and, according to the weight of testimony, a large proportion of the proceeds went into the hands of the father, who set up a small grocery upon them.

Several features are prominent in this affair that destroy plaintiff's equity. In the first place, regarding it in the most favorable light, the complainants deal with a youth, not of age in fact, but, according to their conclusion, just of age, and buy of him his farm for buggies and small notes. The father's presence afforded no protection, for he was a spendthrift and expected to enjoy what was received. The trade, under such circumstances, without further evidence, is not entitled to favor in a court of equity. It is a sharp dealing with the folly and recklessness of youth.

(392) There is another feature in this transaction which is opposed to the plaintiffs' equity. They had sufficient warning that defendant was not of age to induce fair and prudent men to desist, and yet they persevered, choosing to run the hazards for the gain. They ought to abide the result of the chances.

The Court perceives the plaintiffs have sustained a serious loss, but it is one which they have suffered in such way as to leave them without right of equitable relief. It was chiefly suffered at the hands of the elder Jones, and, to the extent that the younger acted at all, he seems to have been a passive instrument in the hands of the other. The defendant derived little or no benefit from the transaction, and as against him plaintiffs are entitled to no relief.

The injunction under which the defendant lies should be dissolved and

PER CURIAM. Bill dismissed.

JAMES N. WHEDBEE v. LAVINA WHEDBEE, EXECUTRIX.

Where a guardianship was closed by a settlement and release after the ward arrived at full age, it was *Held*, in analogy to the statute of limitations to an action of account at law, that the court would not entertain a bill to reopen the investigation of the guardian's accounts on the ground of undue influence, fraud, or mistake, after three years from the closing of the trust.

CAUSE removed from the Court of Equity of PERQUIMANS.

The bill was brought against the executrix of James P. Whedbee, as guardian of the plaintiff, for an account and settlement. The defendant's testator entered in as plaintiff's guardian in 1831 and continued in the office until 1845, when the plaintiff, having lately become of age, he surrendered the estate to him. At the time of delivering up the property, the guardian took from the plaintiff a written instrument, which is as follows:

"I, James N. Whedbee, have this day settled with James P. (393) Whedbee, my guardian, and have received from him all the funds that he has received for me as my guardian, and I do hereby release the said James P. Whedbee from all claims and demands arising from any obligation he may have incurred as my guardian. In testimony whereof, I have hereunto set my hand and seal." Signed and sealed by the plaintiff in the presence of witnesses.

The plaintiff alleges that he was very young when this instrument was given; that it was not done upon a full settlement and examination of the state of the business; that the guardian was a relation, and, being childless, he had often promised he would make him the sole heir of his estate, and had a will prepared to that effect, by which promises and by other means he acquired much influence over the plaintiff and induced him to receive, without question or examination, his account of the state of the guardianship and to give the instrument above set forth; but that the same is delusive—made without a fair exhibit of his liability and drawn from the plaintiff by the unfair influence which the guardian exerted over him. The bill goes on to specify many particulars in which the guardian rendered him no account, and others wherein the account rendered him was false, being made too small, and prays that, notwithstanding such partial settlement and release, his guardian may be forced to come to a fair account with him and pay over the funds in full.

The defendant answered, and also pleaded the release and the length of time between the settlement and the bringing of this suit (which was in the spring of 1853), and insists upon it as a bar in analogy to the statute of limitations for a money demand at law.

W. A. Moore and Jordan for plaintiff.
Johnson for defendant.

MANLY, J. This is a bill filed by the complainant against the executrix and executor of his former guardian for an account and set-
(394) tlement of the guardianship. It was filed nine years after the ward had arrived at full age and eight years after he had had a settlement with his guardian, payment in full, according to the account then rendered, and a release.

We think it was too late to demand a readjustment of the guardian accounts.

A release taken by a guardian from his ward upon a settlement soon after the ward's arrival at age is looked upon with some suspicion in a court of equity, and would not be regarded as conclusive, provided the ward make his appeal to the courts in proper time. The parties to such a settlement bear relation to one another of control and dependence, respectively, which make it unfit that it should be conclusive. But it would be equally hard, on the other hand, after the guardian had tendered and made a prompt settlement, that there should be a right in equity indefinite in time, to call him into court and reopen the accounts. We think that time must be limited, and as a bill for an account is similar to, and in many respects a substitute for, the old action of account, we limit the time to three years from the period when the trust was closed.

So much has been said recently in our reported cases upon the effect of time on closed and unclosed trusts, respectively, that I deem it unnecessary to repeat it here further than to say it may now be considered as a settled general rule with respect to *closed* trusts, that they are subject to the statutory and common-law presumptions and the statute of limitations, which the class of unclosed trusts is not. *Falls v. Torrence,* 11 N. C., 412; *Bird v. Graham,* 36 N. C., 196; *Davis v. Cotten,* 55 N. C., 430; *West v. Sloan,* 56 N. C., 102; *Oldham v. Oldham, ante,* 89.

We are of opinion, therefore, that the equitable right remaining in complainant after the settlement in 1845 was barred by the lapse of *three years* in analogy to the bar to the action of account.

PER CURIAM. Bill dismissed with costs.

Cited: Barham v. Lomax, 73 N. C., 79; *Spruill v. Sanderson,* 79 N. C., 469; *Briggs v. Smith,* 83 N. C., 307; *Timberlake v. Green,* 84 N. C., 661; *Slaughter v. Cannon,* 94 N. C., 193; *Wyrick v. Wyrick,* 106 N. C., 87.

DUNCAN G. McRAE ET AL. v. THE ATLANTIC AND NORTH CAROLINA RAILROAD COMPANY.

1. Where the charter of a railroad company required that "its treasurer and president should, before receiving an installment from the State, satisfactorily assure the board of internal improvements by a certificate, under the seal of the company, that an amount of the private subscription has been paid, in equal proportion to the payment required of the State," it was *Held*, that for the railroad company to take, as cash, the notes of individuals made for the occasion to enable the officers to make the certificate under a promise that such notes were not to be enforced, was immoral and against public policy, and such individuals, being in *pari delicto*, had no equity to be relieved against such notes.

2. Where it was stated in a bill that certain notes were, by agreement of the parties, not to be collected in cash, but to be paid off in the notes of certain persons, and it was alleged that such notes had been tendered and refused, it was *Held* necessary that the plaintiff should aver that he still had the notes, and was ready to deliver them.

3. An injunction is only granted as ancillary to some primary equity, except to stay waste and to prevent irreparable injury.

(395)

APPEAL from an interlocutory order of the Court of Equity of CUMBERLAND, dissolving an injunction; *Shepherd, J.*

The plaintiffs gave their note to the Atlantic and North Carolina Railroad Company for $250, and thereupon the plaintiff McRae, who was the principal in the note, claim to be entitled to two and a half shares of the stock of the said company. The stock was originally subscribed by a corporation called the Carolina City Land Company, and was a part of 250 shares subscribed by that corporation in 1856, and was taken on himself by the said McRae because he was a member of the said city corporation, and this amount was in proportion to his interest in the said company. The bill alleges that when the Carolina City Land Company made its subscription to the railroad stock, it did so upon the express promise and assurance made by the railroad company that no part of the subscription thus made should be called for until after the railroad company had expended $25,000 in making a wharf and other works necessary to their road at Carolina City, (396) and not even then until after the land company had time to make sales of their lots, and that when such sales were made the railroad company would take the notes of individuals given for lots in discharge of the land company's liability for their stock subscription. The bill further alleges that in May, 1857, the railroad company made application to the land company to have the notes of the individual stockholders taken with sureties for the proportionate share of their liability as stockholders in the said company subscription, and that the subscription

should then be credited with these notes as payments on that stock, and that the avowed reason for wishing this substitution was to enable the president of the railroad company to certify that the company subscription had been paid, for that until such certificate was made, the State's subscription for an amount double the installment of individuals then due could not, under the charter, be paid; that if the substitution should be made they would not call on the individuals for the money, but would still look to the land company as the real debtors, and would wait till the expenditure before that time stipulated should be made, and the sales made of town lots, and would then take the notes of persons to whom lots were sold; that on being asked by one of the board of directors of the land company to reduce this arrangement to writing, Mr. Whitford, the president of the railroad company, replied that "he preferred not to do so, because he could not then so clearly certify to the Governor, but at the same time pledged his word, and said he was authorized to pledge the directors to this arrangement"; that confiding in this solemn assurance, the arrangement had been entered into, and this, among other notes, was given in pursuance thereof; that subsequently, sales of town lots were made to an amount of between fifteen and eighteen thousand dollars, and the purchase money secured in good notes on individuals, and that accordingly these notes were offered to the railroad company in part discharge of the liabilities assumed by these individuals for the land company, but these were refused, the president of the railroad company remarking that the railroad
(397) company were content with matters as they then stood, and would consent to no change.

The prayer is for an injunction to stay the collection of the judgment entered into on the note in the court of law, which was issued in vacation; and at this term the bill was answered by the railroad company, but as the case is decided entirely on the plaintiff's equity, as set out in the bill, it becomes unnecessary to notice the further pleadings.

The injunction was ordered to be dissolved in the court below, and the plaintiffs appealed to this Court.

Buxton for plaintiff.
Stevenson and Green for defendants.

Pearson, C. J. The injunction ought to have been dissolved on the ground that it was improvidently issued. By their own showing, the plaintiffs bring themselves within the maxim, "A party must come into equity with clean hands," and their case falls under the principle which is acted on, both at law and in equity, *i. e.*, the courts will not enforce an agreement which is unlawful, immoral, or against public policy, at the instance of one in *pari delicto*. *Melvin v. Easley*, 52 N. C., 356.

The bill, among other things, alleges that the note in controversy, and others of a like kind, were executed in order to close the subscription of the Carolina City Company to the railroad company, and thereby enable the railroad company to make the certificate which was necessary to obtain from the public treasurer the last installment of the State subscription, with the understanding that the railroad company would then complete the works at Carolina City, and with the further understanding that no money would be required to be paid on the notes, and time would be given to make sale of the lots, and the sale notes be accepted in satisfaction, and "on being asked to reduce this arrangement to writing, the president of the railroad company refused, saying "that he preferred not to do so, because he could not then so clearly certify to the Governor, but at the same time pledged his word and said (398) he was authorized to pledge the directors to this arrangement," and upon the faith of this pledge, publicly and solemnly made, the notes were executed.

The charter of the railroad contains this clause: "Provided, the treasurer and president of said company shall, before they receive the aforesaid installments, satisfactorily assure the Board of Internal Improvements, by certificate under the seal of the said company, that an amount of the private subscription *has been* paid in equal proportion to the payment required of the State."

So the very purpose of the agreement which the bill seeks to enforce was to enable the railroad company to obtain money from the State without a compliance with the provisions of the charter.

But, in the second place, the bill is not so framed as to entitle the plaintiffs to their supposed equity against the defendant. It is alleged that the city company made the subscription to the railroad company upon an agreement that certain works should be constructed at the city, and that the works stipulated for have not been completed. Admit that this agreement could be established, and would not fall under *R. R. v. Leach,* 49 N. C., 340, the equity arising from it would be that of the Carolina City Company, and clearly the plaintiffs are not at liberty to set up an equity on the part of the city company without making it a party to the bill, even supposing that this equity was not waived by paying off its subscription with the individual notes of the stockholders, and thereby entitling itself to so much stock in the railroad company as was paid for.

As a further ground of equity, the bill alleges that the defendant agreed not to enforce the payment of the note in money, but to wait until the city company could sell lots, and then to accept from it "sale notes" in payment of the notes in question, which the city company passed to the railroad company in discharge of its stock, and that sale

(399) notes had been accordingly tendered to the defendant before the institution of the suit at law. To this ground there are three fatal objections.

The city company was a party to this arrangement, and, of course, ought to be a party to a suit which seeks to enforce it.

The bill does not aver that the plaintiffs still have the sale notes ready to hand over to the defendant in discharge of the judgment at law, and it may be the sale notes have been appropriated to other purposes; if so, they ought clearly to pay the judgment.

The bill sets up no primary equity, in aid of which the injunction is asked for, but is framed upon the idea that the injunction is to be made perpetual, and then the matter is to stop, leaving the stock which the city company holds in the railroad company unpaid, and the controversy in regard to it unsettled. An injunction is only granted as ancillary to some primary equity, except to stay waste and prevent irreparable injury. This subject has been so often explained in our decisions within the last few years that it is unnecessary to enter into it again. There is no error.

PER CURIAM. Affirmed.

Cited: Martin v. Cook, 59 N. C., 200; *Whitaker v. Bond,* 62 N. C., 227; *King v. Winants,* 71 N. C., 472; *McNeill v. R. R.,* 135 N. C., 734.

DIBBLE AND BROTHERS v. B. AYCOCK ET AL.

Where an injunction was granted to restrain the collection of a part of an execution of *fi. fa.*, upon the condition that the plaintiffs would pay into the office from which the *fi. fa. issued* a certain amount of it, admitted in the pleadings to be due, it was *Held* that a sheriff who had levied the *fi. fa.* for the whole sum on property sufficient to make it was entitled to his commissions on the amount paid into the clerk's office.

CAUSE removed from the Court of Equity of LENOIR.

The several matters in controversy between the plaintiffs and defendants afford no point necessary to be reported; but a matter of interest arises out of the petition of William Fields, sheriff of Lenoir (400) County, who represents to the court that when the *fi. fa.* in this case mentioned issued from the county court of Lenoir, and came to his hands as sheriff, he levied the same on the property, consisting of slaves, mules, horses, wagons, etc., sufficient to satisfy the whole amount thereof, to wit, $10,689.69, with costs; that he took the same into his possession, and was holding the same in his hand to answer the exigency of the writ, when he was enjoined from proceeding under the execution,

and he returned the same to the office without raising any money thereon; that the said injunction issued on a fiat made by Judge Shepherd, which required that previously to the issuing thereof the plaintiffs should pay into the office of the county court of Lenoir, where the judgment was, the sum of $7,000, and that the same was done according to the condition. The sheriff (Fields) insists that he is entitled to commissions on the amount thus paid into the clerk's office, and asks the court, if they should be of that opinion, to order the same to be taxed with the costs in the cause.

Stevenson for plaintiff.
J. H. Bryan and strong for defendants.

MANLY, J. The petition of William Fields, sheriff of Lenoir, calling to the attention of the court the subject of his commissions for the partial execution of a *fi. fa.* against complainants has been considered by the Court. It seems that he had made a levy under the *fi. fa.* when he was prevented from further action by the injunction issuing from the master's office of Lenoir. We are of opinion that the sheriff is entitled to his commissions upon the moneys paid into the office of the clerk of the county court of Lenoir, to wit, upon $7,000, and these commissions should be included in the bill with the other costs in the cause.

The law upon the subject of sheriff's fees (Rev. Code, chap. 102, sec. 21) gives 2½ per cent commissions to that officer upon all moneys collected by him by virtue of any levy, and the like commissions for all moneys that may be paid to the sheriff by the defendant while (401) such precept is in the hands of the sheriff, and after levy. The sum upon which commissions is asked was paid into the office of the court for plaintiff while the precept was in the sheriff's hands, and after a levy. The case is strictly, therefore, within the provisions of the law. That the payment was made under a condition for an injunction does not affect the question at all.

The decree should be for a dissolution of the injunction and for the defendants' debt upon the injunction bond, with costs, including commissions of Sheriff Fields upon the sum of $7,000.

PER CURIAM. Decree accordingly.

Cited: Willard v. Satchwell, 70 N. C., 269; *Cannon v. McCape,* 114 N. C., 583.

JOHN H. DALTON, EXECUTOR, v. JOHN A. HOUSTON ET ALS.

Where the meaning sought to be attributed to a codicil would be to take away the greatest part of a legacy given in the will, on the day before, to a grandson, and cause an intestacy as to that much of the estate, to a part of which the legatee would be again entitled under the statute, there being no change in the state of the testator's affairs, and the language of the will being ambiguous, it was *Held*, according to rules of interpreting such instruments, not to have been the intention of the testator to revoke the former legacy.

CAUSE removed from the Court of Equity of IREDELL.

The question in this case arises upon the construction of the will of Placebo Houston, which the executor therein named submits to this Court for protection against the conflicting claims of the parties interested. The portions of the said will material to the consideration of the case are as follows:

"Item 2. I will and direct that after the payment of my debts, all the rest of my estate, both real and personal, shall be equally divided (402) among my living children and the children of my deceased children, the child or children of a deceased child taking one share, which their parent would have taken had he lived, to be equally divided among them when such deceased child has left more than one child surviving. In making this division, each child is to account for all advancements since they came of full age."

Item 3 proceeds to limit the share of a daughter, Mrs. Motz, taken under the preceding clause, to her sole and separate use during her life, and then to her surviving children, equally to be divided.

The fourth item limits the share to be taken under the above (second) clause by the five children of a daughter, Sarah Louisa, to the survivors on the dying of either without child or children.

Item 5 provides that the one-fifth which will, by the second clause of the will, fall to John Augustus Houston, son of Augustus C. Houston, on his dying under age without wife or child, is to be divided among the testator's surviving children and the children of such as are dead (taking *per stirpes*).

The will is dated on 2 March, 1852. To this will is attached a codicil, dated 3 March, 1852, which is as follows:

"Codicil to the foregoing will:

"Whereas, I, Placebo Houston, have made my last will and testament in writing, bearing date 2 March, 1852, and thereby made sundry devises and bequests, according to the then existing circumstances of my estate, but which circumstances have now materially changed, I do, by this writing, which I hereby declare to be a codicil to my said will, to be taken and construed as a part thereof, will and direct, and give to

my daughter Lucy M. Motz one negro man, Osborne, Kissey and her increase, and William. Also to my daughter Louisa Rhinehart's children, Amy, Hetty, and their increase. To my daughter Mary Cecilia Dalton, Cynthia and Carolina and their increase; Sally and her increase, and Mary, to be valued, and if a surplus, to be refunded to the estate. To To my son Thomas F. Houston, Dick and Alexander, Conda, Eliza, Tabitha, and their increase. To my grandson John Au- (403) gustus Houston, the sum of $1,000, including his interest in the money for the jack, yet to be collected; and should he die before the age of 21 years, his property to revert back to my children, the said Augustus having no further interest in my effects. My real estate to be sold as my executors deem best for the interest of the estate, and the balance of my negro property to be left to the discretion of the executors, to manage as they may think best to promote the best interests of the estate, all of my stock and farming tools, household and kitchen furniture, blacksmith tools, loose plunder of every kind," etc.

The question submitted by the executor is, whether by this codicil, the bequest to John A. Houston of one-fifth in the body of the will is revoked by the codicil, and the said John A. is to be restricted to the $1,000, or does he take the latter sum in addition to the bequest of one-fifth part? The estate of the testator was a large one, and by making this codicil act as a revocation of the will, there would be a very great reduction in the interest given to John A. Houston and cause an intestacy as to the one-fifth intended for him, to which, as one of the next of kin, he would be in part entitled at all events.

W. P. Caldwell and Boyden for plaintiff.
Mitchell for defendant.

PEARSON, C. J. The pleadings involve the construction of the codicil and its effect upon the provisions of the will. Does the codicil revoke that provision which gives to the testator's grandson, John A. Houston, one-fifth part of the estate? Or has it simply the effect of *naming the slaves* which he had before put into the possession of some of his children, and which the will in general terms directs to be accounted for as advancements and of giving to John A. Houston $1,000, including his interest in the money for the jack?

The difference in these two results is very great, and it may be (404) that we have not been able to comprehend the meaning of the testator. If so, it was his misfortune not to have expressed it in direct terms so that it could be understood. All we can do is to attempt to arrive at his intention according to the established rules of construction. By the aid of these rules, after giving to the subject much consideration, we are of opinion that the latter is the proper construction.

"A codicil is a supplement to a will, or an addition made by the testator and annexed to and to be taken as a part of the testament, being for its explanation or alteration, or to make some addition to or substitution for the former disposition of the testator." 2 Black. Com., 500. "In dealing with such cases,it is an established rule *not to disturb the dispositions of the will* further than is *absolutely necessary* for the purpose of giving effect to the codicil." 1 Jarman on Wills, 160, and the cases there cited.

To give to the codicil under consideration the effect of revoking the will in respect to the disposition made of one-fifth part of the testator's large estate, and of cutting off his grandson, to whom he had given that fifth part, so as to allow him only $1,000, which is to include the amount to which he was before entitled on account of the jack, and of leaving this fifth part undisposed of, would be very greatly to disturb the dispositions of the will, and cannot be justified by any rule of construction, unless direct words be used to express that such is the meaning of the testator.

The codicil begins by setting out that the will "made sundry devises and bequests according to the then existing circumstances of my estate, but which circumstances having now materially changed, I do, by this writing, which I hereby declare to be a codicil to my said will, to be taken and construed as a part thereof, will and direct, and give to my daughter Lucy," etc. This announcement prepares one to look for great results, but when taken in connection with the fact that the will was executed the *very day before* the codicil was made, so that there was no time for the "existing circumstances of the estate to have mate-
(405) rially changed, and with the dispositions made in the codicil, it is obvious that it is in truth a "mere preamble," which the man who was writing the codicil had taken from some old form that he had seen or had then before him, and consequently is not deserving of very great weight in putting a construction upon the disposing parts of the instrument.

In looking at the clause of the codicil which gives rise to the difficulty, we find enough to create perplexity as to the meaning, but not enough to satisfy the mind that there was an intention to revoke. After giving the $1,000, it proceeds, "And should he die before he arrives to the age of 21 years, *his property* to revert back to my children, said John Augustus *having no further interest in my effects.*" "His property" can hardly refer to the $1,000 because that is not the way we usually speak of *money;* and if it refers to the property which he takes under the will, and there is nothing else to which it can refer, it is a recognition, instead of a revocation, of the provision made for him by the will, and the words "having no further interest in my effects" may be satisfied by

supposing them to refer to the fact that both by the will and the codicil, the legacy given to John A. Houston is subject to a limitation over if he should die before the age of 21 without wife or children, *in which event* he would have no further interest in the testator's estate. At all events, these words are of too doubtful an import to justify the conclusion that the testator intended to revoke his will, made only the day before, as to one-fifth, so as to leave that part undisposed of, and consequently to be distributed among his next of kin, in which distribution his grandson, whom it is his supposed intention to disinherit, would take one-fifth part of this undisposed of fifth part, which leads to an absurdity. These considerations and the well-established rule that a will and the codicil should be so construed as to make them stand together, unless the words forbid it, lead us to the conclusion that the codicil does not amount to revocation.

There will be a decree declaring that, in the opinion of this (406) Court, John A. Houston is entitled as well to the one-fifth part given him by the will as to the $1,000 given him by the codicil.

PER CURIAM. Decree accordingly.

Cited: Jenkins v. Maxwell, 52 N. C., 613; *Biddle v. Carraway,* 59 N. C., 98.

AUGUST TERM, 1860

AT MORGANTON

(407)

DANIEL BLAKE v. J. W. ALLMAN.

1. A trustee who permits one to hold adversely to his title for more than seven years under a grant cannot sustain a bill to have such holder converted into a trustee, although the *cestui qui trust* may have been under age and out of the State at the time.

2. A trustee cannot proceed to vindicate the title entrusted to him from an adverse claim by a bill without making the *cestiu qui trust* a party.

CAUSE removed from the Court of Equity of CHEROKEE.

The bill in this case was brought by the plaintiff as trustee, holding for and in behalf of an infant, the heir of one Courtney. The allegation is that Henry Courtney, a foreigner, at one of the sales of Cherokee lands authorized by Assembly, bid off the land in question and took the certificate of purchase in the name of the plaintiff, at the (408) time paying one-eighth of the purchase money, according to the terms of the sale, and gave bond with the defendant and one Pace as sureties for the remainder of it; that in 1839 and 1842 he made payments amounting to nearly one-half of the sum agreed to be given for the land; that Henry Courtney died intestate, leaving one son, Charles Courtney, a resident of Georgia, his heir at law, who also died intestate about the year 1844, leaving an infant son whose name is unknown to the plaintiff his heir at law, who is the *cestui qui trust* and beneficial owner of the said land; that in 1845, an act of the General Assembly was passed constituting a board to value the lands purchased from the State at the sales aforesaid, and to assure such lands at such valuation to the purchasers, and in case of the insolvency of the principals, to their solvent sureties, on certain conditions as to securing the purchase money; that the guardian and friend of the said infant procured one Rhea to list the said tract for valuation, and that he was ready to comply with the terms of the act of Assembly by paying the residue; that the defendant had paid some money towards the land at various times, amounting in all to about $10, and appearing before the said board of valuation, by collusion with the commissioners, or some of them, he procured the name of the plaintiff, in which it had been listed by Rhea for the valuation, to be stricken out and that of

the defendant to be inserted; that with what had been paid by Courtney and the sums paid him (defendant), there remained but 13 cents to make up the amount at which the commissioners valued it; that this small sum was paid by the defendant, and he took the commissioners' receipt and certificate, which, by the act aforesaid, entitled him to a grant from the State; that he accordingly obtained a grant, and having entered into possession, he (the defendant) had held it for nine years, claiming the land as his own.

The *cestui qui trust* is not made a party to the bill. The prayer is that the defendant may be declared a trustee for the plaintiff, and that he may be ordered to convey the premises either to the (409) plaintiff or to the *cestui qui trust.*

There was an answer and other pleadings in the case, but as the view of the court is confined to the plaintiff's bill it is not deemed necessary to set them out.

Shipp for plaintiff.
J. W. Woodfin for defendant.

MANLY, J. Upon a consideration of the pleadings in this case, two objections to the relief which the plaintiff seeks are apparent and decisive.

Whatever may have been the merits of the complaint, if made in time, it is too late now, after the defendant has been nine years in adverse possession of the land in question, claiming it under a grant to himself, to declare his holding a constructive trust for plaintiff. Following the rules of law for quieting titles to lands and litigation generally, the bill ought to have been brought, at furthest, within seven years after the possession taken under the grant.

It is alleged in the bill that the purchase of the land in question was made in the name of the plaintiff by Henry Courtney, and that an infant, whose name is unknown, residing in Georgia, is the person who is now entitled to the beneficial interest in the same. We do not think that this fact alters the case. The trustee Blake has allowed the time to run out, and his rights are barred, whatever liabilities may spring out of the negligence as between the infant and the plaintiff or between the infant and both the parties to this suit.

The fact, however, thus noted, suggests the other objection to any relief under this bill, and that is, the child in Georgia is a necessary party to the bill. His interest in any decree which is asked for, or can be made in the case, is direct and plain, and no authority is requisite to show that he is a necessary party to the bill. It is a principle of equity jurisprudence to avoid a multiplicity of suits, and so to order

(410) proceedings as to do complete justice between all the parties interested in the subject-matter before the Court. For either one of the reasons thus given, the bill should be dismissed with costs.

PER CURIAM. Bill dismissed.

Cited: Clayton v. Cagle, 97 N. C., 303.

EDWARD S. CARTER ET ALS. v. MADISON GREENWOOD.

Where the heirs at law and next of kin of a deceased person took possession of his estate and divided it out among themselves, and sold some of it, it was *Held* that the court of equity could not protect them by restraining an administrator, regularly appointed, from recovering the property in actions at law.

THIS was an appeal from the Court of Equity of BUNCOMBE on a decretal order made by *Heath, J.,* at last spring term.

The plaintiffs are the next of kin and heirs at law of Samuel Carter, who died intestate in Buncombe County. It is alleged in the plaintiffs' bill that, for the purpose of saving the expense and trouble of a regular administration, they came to an arrangement and understanding among themselves by which to settle and divide the estate of the said intestate; that they paid off most of the debts of the estate—some of them took the real estate for their share and the others the slaves and other property for theirs; that several of them had conveyed their property thus acquired and made deeds of conveyance for the same; that the defendants having a small debt of about $35, had applied to the county court and obtained letters of administration on the estate; that in virtue thereof he had commenced actions of trover against the recipients of the slaves, and were urging the same to judgment. The prayer of the bill is for an injunction to restrain the defendant from further

(411) carrying on these suits, the plaintiffs offering to submit to a decree for the amount due the defendant.

The defendant answered, explaining the reason of his taking the course attributed to him by the plaintiffs, but from the view taken of the case, the matters set forth are immaterial. On the coming in of the answer, the injunction which had been issued was ordered to be dissolved, and the plaintiffs appealed.

Avery for plaintiffs.

N. W. Woodfin, J. W. Woodfin, and Gaither for defendant.

PEARSON, C. J. There is no error in the decretal order appealed from. By the plaintiffs' own showing, "for the purpose of saving the expense

and trouble of a regular administration," they took possession of the estate of Samuel Carter and divided it out among themselves, thus acting in direct violation of the statute, which prohibits such an irregular intermeddling with the estate of a deceased person, and subjects the parties to a penalty. It follows that the Courts cannot aid or protect them from the consequences of their own illegal acts. This is settled. *Ramsey v. Woodward,* 48 N. C., 508; *Sharp v. Farmer,* 20 N. C., 255. The case admits of no further discussion at this stage of the proceeding.

PER CURIAM. Decretal order affirmed.

Cited: McNeill v. R. R., 135 N. C., 734.

(412)

ARTHUR BLAKE ET AL. V. HENRY E. LANE.

1. Where the payee of a sealed note took a mortgage of slaves for the security thereof, which he permitted to lie for at least sixteen years without the payment of any part, even interest, and during that time the slaves remained in possession of the mortgagor, who sold some of them for the satisfaction of other debts, it was *Held* that this amounted to a presumption that the right to foreclose had been abandoned.

2. Where the question was, whether the length of time during which the mortgagee of slaves had foreborne to enforce his security did not create a presumption of the abandonment of the right to foreclose, it was *Held* that the insolvency of the mortgagor was not evidence to rebut the presumption.

CAUSE removed from the Court of Equity of RUTHERFORD.

The defendant Lane, in 1840, executed to the plaintiff Arthur Blake a sealed obligation for the sum of $2,000, which purports to be for value received, at which time a mortgage deed in the common form of a deed of trust, conveying seven slaves, was executed to the plaintiff Walter Blake, as trustee, to secure the payment of the said obligation, and the said instrument provides that the said Walter, as trustee, shall sell the property for the purpose aforesaid, unless the defendant should pay the said debt on or before 1 November, 1841, with interest. The deed provides that the defendant should retain possession of the slaves until the same should be wanted to answer the purposes of the trust, and the defendant did retain the possession of them, without any demand for the money or the property, until about 1856, when a bill in equity similar to the present was filed. The bill alleges the insolvency of the defendant, and that he is about to sell the slaves mentioned in the deed of trust and have them conveyed beyond the limits of the State, and that he is apprehensive that he will lose the benefit of his said security. He therefore prays for a writ of sequestration to restrain the defendant in

this particular, and also that the trustee may be decreed to take possession of the slaves in question and sell the same for the satisfaction of the said debt. The bill of plaintiffs, by way of anticipating the
(413) conclusion from the lapse of time, alleges the recognition of the existence of the debt by the defendant at various times and in various letters and other written evidences to the same effect, and attempts to explain the fact that the defendant has had possession of the slaves, and that nothing has been paid on the note and no attempt made for so long a time to enforce the mortgage by the allegation that the defendant was much oppressed with debt and has since become insolvent, and as he was in prosperous circumstances himself and did not need the money, from tenderness and kind feeling towards the defendant and his family, he gave him this long indulgence.

The defendant answers and insists on the long lapse of time from the day of forfeiture (1 November, 1841) to the date of the commencement of this suit (13 December, 1858) and his continued possession of the slaves as the grounds of a presumption that the plaintiff abandoned his right to enforce the security sought now to be set up. He admits the execution of the sealed note and the deed of trust set out in the bill, but he says these were made not for a loan of money or any other valuable consideration, but in order to keep his other creditors from seizing on these slaves for the satisfaction of their debts, and that it never was the design of the parties that the said mortgage or note should in any way be enforced. He alleges, further, that he did sell two of the slaves to neighbors of his, and applied the proceeds to the payment of other debts, and that the plaintiff Arthur made no complaint about it and has never given himself any concern as to the mode in which these slaves were treated.

There were proofs taken in the cause which are sufficiently treated of in the opinion of the Court.

Being set down for hearing, the cause was transmitted by consent.

Shipp and Gaither for plaintiffs.
N. W. Woodfin and J. W. Woodfin for defendant.

(414) PEARSON, C. J. The defendant held possession of the slaves for more than ten years after the execution of the mortgage. During that time some of them were sold for the satisfaction of other creditors, and the mortgagee makes no objection; and during the whole time, nothing is said or done in respect to the mortgage debt, and not even one cent of interest is paid or demanded.

From this state of things, the law requires the Court to presume that the right to foreclose, or otherwise enforce the mortgage, has been *aban-*

doned for some cause or other; whether by reason of a different arrangement which the parties may have made, or because the mortgage money has in fact been paid, or because, as is alleged in the answer, it never was the intention of the mortgagee to enforce the mortgage, are subjects beside the question.

The presumption of the abandonment of the right to enforce the mortgage being established, the question is narrowed to this: Do the plaintiffs offer evidence sufficient to rebut this presumption? Without entering into a detailed examination of the evidence, it is sufficient to say, after perusing and giving to the whole of the evidence full consideration, we are of opinion that no fact established by the proofs is sufficient to rebut the presumption of an abandonment of the right to enforce the mortgage. The proof in regard to the insolvency of the defendant and his consequent inability to have paid the mortgage debt is beside the question, because the slaves conveyed by the mortgage constituted a fund out of which the payment of the mortgage debt could at any time have been enforced; and for reasons of public concern, if the matter is allowed to stand for more than ten years, during which time the *mortgagor is in possession,* the Court is required to presume that the right to foreclose has been abandoned.

In regard to a mortgage of slaves, if the mortgagee holds possession for more than two years after the *time* of forfeiture, the equity of redemption is barred by the statute of limitations—showing that the policy of the law is to discourage all suits on stale claims, espe- (415) cially in regard to property of this description.

PER CURIAM. Bill dismissed.

Cited: Headen v. Womack, 88 N. C., 470; *Wiley v. Lineberry,* 89 N. C., 18; *Thornburg v. Mastin,* 93 N. C., 262; *Newton Academy v. Bank,* 101 N. C., 489.

N. H. HUFFMAN v. EMMA FRY ET ALS.

The right of a creditor to have a specific lien which is about to fail from the mistake of a draftsman set up in a court of equity is superior to that of the general creditors of an insolvent intestate who have no lien.

CAUSE removed from the Court of Equity of CATAWBA.

The plaintiff became the surety of Joseph Fry in a note for $100 to one Rhyne, and to secure himself against loss on account of this note he took from the said Fry a deed of trust for a town lot, in the town of Newton, properly worded for that purpose, except that in stating the consideration the draftsman accidentally and by mistake left out the

word "dollar" after the word "one," which it was the intention of the parties should be expressed as *one dollar;* and except, also, that by accident and mistake in the *habendum* of said deed of trust, instead of limiting the estate in the premises to the plaintiff "N. H. Huffman and his heirs," the said deed is written so as to limit such estate to the said "Joseph Fry and his heirs." The said deed was duly proved and registered. The bill sets out that the plaintiff has been obliged to pay the debt to Rhyne; that the said Fry is now dead, and that his estate has been exhausted in the payment of his debts, and that his debt will be entirely lost if this lien is not established. He therefore prays that the deed may be corrected so as to express the intention of the parties, and that the property may be ordered to be sold under a decree of the court. The answer of the defendants, who are the widow and administrator of Joseph Fry, does not contest the facts or the principle asserted (416) in plaintiff's bill, except that it insists that the other creditors of the estate of Joseph Fry are as well entitled to the satisfaction of their debts as the plaintiff, and that as some of them have already obtained judgments binding the assets, that it would not be equitable for the court to interfere and give the plaintiff a preference over them.

Bynum for plaintiff.
McCorkle for defendants.

MANLY, J. We are entirely satisfied, from a consideration of the pleadings and the proofs in this cause, that the omission and error alleged in the deed of 14 August, 1857, are faults of the draftsman. Indeed, this is so manifest upon inspection that proof can hardly make it plainer. The only question is that raised in the answer, whether the equity of the complainant is superior to that of the other creditors in equal degree of Joseph Fry, he being now dead and his estate insolvent. And this, we think, is free from doubt.

The general creditors of the deceased have obtained no specific lien upon the lot of land in the mortgage deed, and it is not, therefore, a contest between the creditors as to priority of lien. It will be found by a reference to the cases in which it has been held that equity will not interfere as between creditors to deprive one of a legal advantage, that they are all cases in which contesting creditors had obtained *specific liens.* The principle does not apply to a case like that now before us, where the contest is between a creditor who has in equity and conscience a right to a satisfaction of his debt out of a specific thing and general creditors who have no such right.

Smith v. Torrentine, 55 N. C., 253, was a contest between creditors under separate deeds of conveyance; the first being inoperative from an

alleged mistake in the draftsman, the Court decided it would not interfere to deprive the latter of his legal advantage. With the principle established in that case, we now entirely concur; but it differs from the one before us in this: The creditors who are disputing (417) the plaintiffs' lien in our case have none of their own, and are only general creditors of the deceased debtor.

We are of opinion that the plaintiff is entitled to the relief which he asks—to a correction of his deed and to foreclosure.

PRISCILLA DOWELL v. RICHARD JACKS ET AL.

A court of equity has no authority to make an order for an inquisition by a jury as to the lunacy or idiocy of a party.

APPEAL from an order of the Court of Equity of WILKES.

The plaintiff alleges in her bill that the defendants, without notice to her and in an irregular and oppressive manner, had proceeded in the county court of Wilkes to have an inquisition of lunacy made as to her, had succeeded in having her declared a lunatic, and had had themselves appointed her guardians. The bill sets out the various particulars in which the proceeding was irregular and erroneous, avers the soundness of her intellect, and prays that the court will order "that a jury may be summoned to make inquiry and return a verdict as to the plaintiff's state of mind," and for general relief.

The defendants answered, denying the allegations as to errors in the proceeding, and denying that the plaintiff is of sound mind, etc. On the coming in of the answers, the court ordered "that issues should be submitted to a jury to try whether the complainant, Priscilla Dowell, was a lunatic, *non compos mentis* and insane, at the filing of the petition in the county court," and, secondly, "whether she is insane at this time."

With this order, the defendants being dissatisfied, they appealed to this Court.

Barber and Lenoir for plaintiff. (418).
Boyden and Crumpler for defendants.

BATTLE, J. The pleadings in this case present the question whether the court of equity in this State has the power to issue a commission for the purpose of having the inquisition of a jury whether a person be an idiot or lunatic; or, in other words, whether it has jurisdiction of the inquiry, whether idiot or lunatic, or not. This is an important and in-

teresting question, and one which has not hitherto, so far as we are aware, been brought before this Court for adjudication. In the investigation of this subject, it may aid us to ascertain in what court or person this jurisdiction was vested in England.

Adams Equity, after speaking of the jurisdiction of the court of chancery in relation to infants, and the mode in which it is called into operation by the filing of a bill to which the infant is a party, makes the following remarks upon the subject of lunacy: "The similarity of principle between the jurisdictions in infancy and lunacy would lead us to anticipate their exercise through the same channel and in the same form of procedure, viz., through the court of chancery in a regular suit. In this respect, however, a material distinction exists. The jurisdiction in lunacy is exercised, not by the court of chancery in a regular suit, but by the Lord Chancellor personally on petition; and the appeal, if his order be erroneous, is to the King in council, and not to the House of Lords." Adams Eq., 290. The mere lunacy does not originate the jurisdiction, but there must be an inquisition by a jury, finding the fact that the person is a lunatic. To do this, the regular course is to issue a commission under the great seal in the nature of a writ of *de lunatico inquirendo* to ascertain whether the party is of unsound mind. This mode of proceeding has superseded "the old way, which was by writs directed to the sheriff or escheator." See Stock on Non Compotes, 15 Law Lib., marginal page, 86 *et seq.*, where the subject is fully discussed and explained. The proceedings under the commission in England are now regulated by statute. Adams Eq., 292, which refers to 3 & 4
(419) Will. IV., chap. 36; 5 & 6 Vict., chap. 84, and 8 & 9 Vict., chap. 100, sec. 2. In this country, under the colonial government, there can be very little doubt that the court of chancery had and exercised jurisdiction over idiots and lunatics and their estates (*Latham v. Wiswall,* 37 N. C., 300), but as to the mode in which the fact of idiocy or lunacy was to be ascertained, we have not now and here the means of learning. Soon after the Revolution, courts of equity were established in this State by an act of the General Assembly, which declared in express terms that they should "possess all the powers and authorities with in the same that the court of chancery, which was formerly held in this State under the colonial government, used and exercised, and that are properly and rightfully incident to such a court, agreeably to the laws in force in this State." See act of 1782, chap. 177, sec. 2, Rev. Code of 1820; 1 Rev. Stat., chap. 32, sec. 1; Rev. Code, chap. 32, sec. 1. Two years after the establishment of courts of equity in this State, jurisdiction was conferred upon the courts of pleas and quarter sessions, commonly called county courts, to appoint guardians for idiots and lunatics who were possessed of property, real or personal, and to take bonds

for the faithful administration of the trust reposed in them, as in the case of the appointment of guardians for orphans, but it was expressly provided that the idiocy or lunacy was to be ascertained "by the inquisition of a jury by virtue of a writ to be issued by such court to the sheriff of the county for that purpose." See act of 1784 (chap. 228, Rev. Code of 1820); 1 Rev. Stat., chap. 57, sec. 1; Rev. Code, chap. 57, sec. 1. The effect of this act has been, in our opinion, to confer upon the county courts original and exclusive jurisdiction to issue writs from time to time, as may be necessary, for the purpose of ascertaining, by the inquisition of a jury, whether a party be an idiot or lunatic, or if he had been once found a lunatic, whether he had become of sound mind again, and to make all orders that may be necessary upon the return of the inquition. After an idiot or lunatic has been thus found to be such and put under guardianship by the county court, there is no doubt (420) that the court of equity has, either inherently or by statutory provision, jurisdiction over his estate, both real and personal, and has power to direct the sale of the same, or any part thereof, and to make all needful orders for the application of the proceeds to the necessities of the idiot or lunatic and his family. See 1 Rev. Stat., chap. 57, sec. 3; Rev. Code, chap. 57, sec. 3; and, also, *Latham v. Wiswall,* 37 N. C., 294; *Ex parte Latham,* 39 N. C., 231; *S. c.,* 41 N. C., 406, and many other cases. In all the reported cases which we have examined in which questions relating to the estate of an idiot or lunatic were brought before the court of equity, we have found that the inquisition of lunacy was taken under the authority of the county court. See *Allison v. Campbell,* 21 N. C., 152; *Tally v. Tally,* 22 N. C., 385; *Christmas v. Mitchell,* 38 N. C., 535.

Our conclusion is, that the court of equity of Wilkes had no authority to make the order for an inquisition by a jury as to the lunacy of the plaintiff, and that consequently such order was erroneous and must be

PER CURIAM. Reversed.

Cited: Dowell v. Jacks, 53 N. C., 388; *Smith v. Smith,* 106 N. C., 502.

CHARITY C. FRANKLIN v. PHOEBE RIDENHOUR.

Where the confidential agent of an aged woman, the manager of all her affairs, took from her a bond to secure an alleged indebtedness without rendering a full account and without giving her an opportunity deliberately to examine into the dealings, it was *Held* that such bond should only stand as a security for what might be due upon taking an account in this Court.

APPEAL from the Court of Equity of SURRY.

The plaintiff was an aged and infirm woman, residing upon her plantation, and having no family but some nine slaves and two de-
(421) pendent and weak-minded relatives. The defendant's testator, Haywood Thompson, was a neighbor in whom she had great confidence and whom she employed as agent and adviser in all her affairs. He received her money, sold her property when any was sold, bought provisions, paid her debts, and professed to keep a strict account of all the dealings between them. This agency continued for five years without any settlement or adjustment of their dealings. At the end of that period, the testator, Mr. Thompson, fell sick, and after lingering for several weeks he died. During this period of his illness several notes were prepared, on a consultation between the sick man and his friends, as the balances due from the plaintiff. These amounts were arrived at partly by reference to loose memoranda on small slips of paper, on which sometimes only plaintiff's name and a sum of money were set down, and partly to the memory of testator's wife, who kept some of these slips, and whose memory seemed to be the chief resource for information, and the book of accounts was confessedly "a small matter." When these sums had been agreed on, two of testator's friends, Nicholson and Suthard, were despatched to procure the signatures of the plaintiff, and such was the profound confidence of the old lady in the integrity of her agent that, as these messengers say, she would not permit them even to read the notes, but signed them, declaring that she knew Haywood Thompson, and that he was an honest man and would not cheat her. The notes thus obtained were sued on by the executrix of the agent Thompson and judgments at law recovered. The bill is filed for an injunction and for an account and settlement of the agency, alleging that the said notes are greatly too large and not at all sustained by the account which was kept by the defendant's testator in his book of accounts; that she has been imposed upon by the implicit confidence which she had in the integrity and business qualities of her said agent.

The agency and the confidential relation stated in the plaintiff's bill are admitted to the fullest extent in the answer, and the chief
(422) scope of it is to justify the amounts for which the notes were given, by enumerating a great number of small transactions as grounds of the plaintiff's indebtedness to the defendant's testator.

On the coming in of the answer, a motion was made in the court below to dissolve the injunction, which was refused by his Honor, and the defendant appealed.

Boyden for plaintiff.
Crumpler for defendant.

BATTLE, J. This case comes directly within the principle decided by this Court at December Term, 1859, in *Futrill v. Futrill, ante,* 61. The defendant's testator was the confidential agent of the plaintiff and the manager of all her affairs. As such, he ought not to have taken from her a bond to secure her alleged indebtedness to him at a time when he had not rendered her a full account of his agency, so as to have given her time to examine it and ascertain its correctness. Under such circumstances, the court of equity will not allow the judgment at law, which his personal representative has obtained upon the bond, any other effect than to stand as a security for whatever may be found to be due to the defendant as executrix, upon taking an account between the parties, on the footing of principal and agent.

The injunction granted upon the filing of the bill was therefore, upon the coming in of the answer, properly continued, and the order to that effect must be

PER CURIAM. Affirmed.

Cited: Hadley v. Rountree, 59 N. C., 111; *Costin v. McDowell,* 107 N. C., 548; *Bellamy v. Andrews,* 151 N. C., 258; *Pritchard v. Smith,* 160 N. C., 84.

(423)

NOAH BROWN ET ALS. v. LARKIN J. BECKNALL ET AL.

1. Where the mortgagor is permitted to remain in possession of the mortgaged premises for more than ten years, during which time no part of the mortgage money, or even interest, has been demanded or paid, and nothing said or done concerning the matter, a presumption arises that the matter has been arranged in some other way, and the right to enforce the mortgage has been abandoned.

2. Loose declarations made *after* the presumption of abandonment from the lapse of time has arisen will not be allowed to rebut it.

CAUSE removed from the Court of Equity of WILKES.

This bill was filed to enforce a mortgage made in 1833. It appeared that Elizabeth Becknall had made the mortgage in question to secure the amounts which her children (the plaintiffs) had recovered against her as executrix of her husband's estate in the court of equity of Wilkes, and that all of them had been paid off but the plaintiff Clara Becknall and Noah Brown, who married one of the daughters. As to Clara, it appeared that she and the defendant Larkin J. Becknall, with their mother, the defendant Elizabeth Becknall, came to a general settlement and adjustment of their claims and dealings in 1847, and it was ascertained that Mrs. Becknall owed Clara $128. At that time Larkin bought from her a lot of land containing 60 acres, assigned to her in the parti-

tion of the estate of her father, at the price of $60. It was arranged that Mrs. Becknall should convey her interest in the land mortgaged in 1833 to Larkin, and he should take on himself the debt of $128 which Mrs. Becknall owed Clara. Mrs. Becknall and Clara made a joint deed conveying both tracts of land to Larkin, it lying adjoining, and he to secure Clara in the $128 which Mrs. Becknall owed her and the $60 which Larkin owed her for the land, made her a mortgage deed of the whole land which they had jointly conveyed to him, which was duly registered. This deed and settlement are relied on by the defendants as a bar to the equity of Clara arising on the deed of 1833.

(424) As to Noah Brown, the defendants rely on the length of time, from 1833 to 1847, during which no attempt was made to enforce the mortgage deed. The mortgagor was in possession of the mortgaged premises during all that period, using and cultivating them, and meanwhile no money was paid on the mortgage debt, principal or interest.

Proofs were taken as to recognition of Brown's equity after 1847, made by Mrs. Becknall, which are noticed in the opinion of the Court.

Boyden and Barber for plaintiffs.
Mitchell for defendants.

PEARSON, C. J. The case is narrowed down to the claims of Clara Becknall and Noah Brown. In respect to Clara, we are of opinion that all of her right under the deed of 1833, for the enforcement of which the bill is filed, was distinguished and merged in the deed of 1847, which was taken as a substitute therefor; consequently her remedy should be on that deed.

In respect to Brown, we are of opinion that his right under the mortgage is presumed to be *abandoned* from lapse of time. The land was a fund out of which he could have enforced payment of the amount due at any time during the space of more than ten years, during all of which time the mortgagor was allowed to retain possession. From this state of things, a presumption arises under the statute that there was no payment of any part of the debt, or even of the interest, and nothing was said or done in respect to it; that the matter has been arranged in some way, and the right to enforce the mortgage abandoned. The Court is required to act on this presumption unless it be satisfactorily rebutted. Loose declarations, such as are proven in this case, *after* the right is presumed to have been abandoned, cannot be allowed the effect of rebutting the presumption, for the object of the statute and of the principle of the common law, which it commends so highly as to require it to be acted on in ten years, instead of twenty, is to prevent fraud and

(425) perjury in regard to "stale claims," on the ground that one who

sleeps on his right for ten years either has arranged it in some way, or ought to lose it because of his negligence.

PER CURIAM. Bill dismissed.

Cited: Ray v. Pearce, 84 N. C., 487; *Headen v. Womack,* 88 N. C., 470; *Simmons v. Ballard,* 102 N. C., 109; *Royster v. Farrell,* 115 N. C., 310; *Bunn v. Braswell,* 139 N. C., 143.

Dist.: Thornburgh v. Masten, 93 N. C., 262.

ALBERTUS BURGIN ET AL., EXECUTORS, v. JOHN E. PATTON ET ALS.

1. Where a testator devised to his own heirs, equally to be divided between them, it was *Held* that the division must be *per stirpes.*
2. Where, in the same clause, personal estate was given by will, with realty, and it was held that as to the latter the division must be *per stirpes,* it was *Held* that the same rule must apply to the personalty.
3. Where a testator evidently designed to cut off a class of his grandchildren as a unit, but did not do so, and they came in under the description of heirs, it was *Held* that they must come in as a unit and take *per stirpes* as the representatives of their mother.
4. Where a testator gave real and personal property to his own heirs, equally to be divided, and it was held that by this clause the children of one deceased daughter took *per stirpes,* it was *Held, further,* that the children of a deceased son claiming under the same description must take in like manner.

CAUSE removed from the Court of Equity of BUNCOMBE.

Samuel W. Davidson, by his will, devised and bequeathed as follows: "The balance of my estate, real and personal, to be equally divided amongst my heirs, except John Burgin, who has treated me badly and now owes me $600, which he refuses to pay. I forgive that, and nothing more of my estate."

Adeline, the daughter of the testator, was married to John Burgin, mentioned in the above clause. At the time of making the said will, the said Adeline was dead, having left the defendants John A. Burgin, M. E. Burgin, Harriet E. Burgin, Samuel D. Burgin, and Adeline L. Burgin, her children, surviving. There were five other grandchildren, the children of Albert C. Davidson, a deceased son, living (426) also at the time the will was made. He had also, at this time, three surviving children, all of whom (children and grandchildren) are made parties to this bill. The plaintiffs are the executors of the said Samuel W. Davidson, and the bill is filed to obtain a construction of the above recited clause of the will. The plaintiffs ask to be informed

whether the children of Adeline can come in as heirs of the testator; and if so, whether they take *per stirpes* or *per capita,* and the latter information is sought as to the children of Albert C. Davidson.

N. W. Woodfin for plaintiffs.
Gaither for defendants.

BATTLE, J. The testator, at the time of his death, left several children and two sets of grandchildren, the children, respectively, of a deceased son and daughter. After a few devises and bequests in his will, he adds: "The balance of all my estate, real and personal, to be equally divided amongst my heirs, except John Burgin, who has treated me badly, and now owes me $600, which he refuses to pay. I forgive that, and nothing more of my estate." John Burgin, thus spoken of, was the husband of the testator's deceased daughter, and is the father of one of the sets of his grandchildren above mentioned. The balance of the estate contained in the residuary clause of the will comprises the greater part of the testator's property, and a question is made whether it is to be equally divided between the testator's heirs *per stirpes* or *per capita.* It is well established as a general rule that if a testator gives an estate to be equally divided between A. and B. and the heirs of C., and the latter has several children, the division will be *per capita;* but if there be anything in the will indicative of an intention that the devises or legatees shall take as families, the general rule will not apply, and the property will be divided *per stirpes,* and not *per capita.* For instances in which the general rule was applied, see *Ward v. Stowe,* 17 (427) N. C., 509; *Bryant v. Scott,* 22 N. C., 155; *Harris v. Philpot,* 40 N. C., 134; *Cheeves v. Bell,* 54 N. C., 234, and *Feimster v. Tucker, ante,* 69; and for instances of an exception to the general rule, see *Spivey v. Spivey,* 37 N. C., 100; *Martin v. Gould,* 17 N. C., 305; *Henderson v. Womack,* 41 N. C., 437; *Bivens v. Phifer,* 47 N. C., 436; *Lowe v. Carter,* 55 N. C., 377; *Gilliam v. Underwood,* 56 N. C., 100; *Lockhart v. Lockhart, ibid.,* 205, and *Roper v. Roper, ante,* 16. The present case differs from all those to which we have referred, either as falling under the general rule, or as being exceptions to it. The gift of the property is to the testator's own heirs, equally to be divided among them. As to the real estate, we think the division must be *per stirpes,* either because the devise is inoperative, and the heirs take by descent, or, if the expression "equally to be divided amongst my heirs" make them take by purchase, the rules of descent must be resorted to for the purpose of ascertaining who are the testator's heirs to take as purchasers, and the rule in relation to the right of representation must be observed as well as any other. Ascertaining thus that the rule of division *per stirpes* applies to the real estate,

it must likewise apply to the personal estate, because it is manifest that the testator intended that both kinds of his property should go together. There is another ground on which we think the division *per stirpes* must be applied to the present case. The testator seems to have thought that John Burgin was one of his heirs because he had been the husband of his deceased daughter. In excluding him from the division among his heirs, the inference is almost irresistible that he intended to exclude his children also, for whom he supposed their father to stand. He failed in the accomplishment of his purpose, because John Burgin is not one of his heirs, but his children, as a class, are. He evidently designed to cut them off as a unit, but as he did not do so, and they can come in under the description of his heirs, they must come in as a unit, and must take *per stirpes* as representatives of their mother. If this argument be well founded, it must apply also to the children of the testator's (428) deceased son, for we cannot believe the testator intended one class of his grandchildren should be regarded in a different light from the other. It is too well settled to need the citation of many authorities for its support that the term "heirs," when used with reference to those to whom personal estate is given, means those who take by law or under the statute of distributions. *Kiser v. Kiser,* 55 N. C., 28; *Brothers v. Cartwright, ibid.,* 113.

A decree may be drawn for the settlement and division of the estate, both real and personal, of the testator among his heirs and next of kin, *per stirpes,* according to the principle declared in this opinion.

PER CURIAM. Decree accordingly.

Cited:. Lee v. Baird, 132 N. C., 766.

HARVEY BARNETT v. JOHN WOODS.

1. In locating a preëxemption right under the act of 1850, sec. 7, in respect to Cherokee land, one entitled to locate under the agent's certificate is not bound to respect the advantage or convenience of one who had an improvement in the vicinity, and who also had a certificate of a preëxemption right, but obtained subsequently to the other.

2. A citizen of a contiguous State who made an improvement on land designated in the act of 1850, but never resided on it, was *Held* not to be entitled to a preëxemption right under said act.

3. Where a person having made an improvement and complied with the act of Assembly allowing a preëxemption right got a certificate of purchase and had a survey made, but was excluded from it by a grant made to an inhabitant of another State under a mistaken construction of the act by the State's agent, it was *Held* that he had an equity to have a conveyance from such grantee for the part of his survey covered by such erroneous grant.

4. It was *Held* not to have been the intention of the Legislature to confer upon the agent for the State of Cherokee lands the high judicial power of determining *conclusively* who were intended to be embraced in said act.
5. If such had been the intention of the Legislature, *quere*, whether it would not have been in violation of the State Constitution.

(429) CAUSE removed from the Court of Equity of CHEROKEE.

The General Assembly of this State, at its session of 1850, passed an act entitled "An act to authorize the sale of the refused land owned by the State in the counties of Cherokee and Macon," which, in section 7, enacts as follows: "Whereas many poor persons being destitute of homes have settled upon the unsurveyed lands in the county of Cherokee, etc., all persons who, prior to 1 January, 1851, resided on said lands, or had made any improvements thereon which add value to the land, shall be entitled to a preëxemption privilege to one hundred acres, to include their improvements, etc.; and upon making satisfactory proof to the agent of the Cherokee lands that he or she is entitled to the preëxemption privilege, within the meaning of this section of the act, it shall be his duty to issue a certificate to such person claiming the preexemption privilege, setting forth the location of the one hundred acres claimed; and upon such certificate, it shall be competent for the persons entitled to the preëxemption privilege to have the said lands surveyed at his or her own expense, etc., and to include his or her improvements, etc., and upon payment being made to the agent of Cherokee lands of one-fourth of the price of the land, and upon entering into bonds with two or more sureties, to be approved of by the agent, payable to the State in three annual installments for the remaining three-fourths, to issue to the said purchasers certificates of the purchase, setting forth the number of the tract, the district in which situated, the number of acres, and the price sold for."

Under this act of Assembly, the defendant Woods made an improvement on a portion of the land described in the said act of Assembly. He, at the time of making this improvement, resided in the State of Georgia near the State line, and the place improved was so near his residence as to be very conveniently used with his home plantation. He continued this improvement for several years, and had it in his possession in 1850, when the above-mentioned act of Assembly was passed. He soon afterwards applied to Jacob Siler, the agent of the Cherokee lands, for a certificate of his preëxemption right, stating the circumstances of

(430) the case. It appears that Mr. Siler had his attention directed to the question whether, being a citizen of Georgia and not having actually resided on the improvement, the defendant was entitled to the benefit of the act of Assembly, and finally decided that he was so entitled; and he, having complied with the other terms of the act, received from the said agent a certificate of his purchase, describing the location

of his improvement. The plaintiff also made an improvement near that made by the defendant, and made application for a certificate according to the same provisions. This application was opposed by the defendant, and after hearing the parties, the agent awarded to the plaintiff a certificate for a preëxemption right, including his improvement; and having complied with the further provisions of the act by paying one-fourth of the purchase money and giving security for the remainder, he obtained a certificate of purchase, which he had returned to the office of the Secretary of State.

The defendant, proceeding on his certificate, had his 100 acres surveyed so as to include the improvement of the plaintiff, and having otherwise complied with the provisions of the act, applied to the office of the Secretary of State and obtained a grant.

The bill charges that this location of the defendant's right was fraudulently made so as to deprive him of the benefit of his certificate; that it did not comply with another requisite of said act, which is, that such surveys should not be more than twice as long as they are broad; that the defendant had enough room to have located his right without intruding upon the improvement of plaintiff. Secondly, the plaintiff insists that, being a citizen of the State of Georgia, and never having resided on the land, and never having intended to reside on it, or to become a citizen of the State, he was not entitled to any preëxemption right at all under the act referred to, and that it is unconscientious for him to insist upon a title given to him under a mistaken view of the act by the State's agent; that having been excluded by this defeasible title of the defendant, he has a right to have him declared a trustee for him as to so much of his survey as is covered by the grant of the (431) defendant.

It appeared that by running up the side of the mountain, and taking in less eligible land, the defendant might have obtained his 100 acres without taking in the improvement of the plaintiff.

The proofs as to the fraud charged by the bill are sufficiently noticed by the Court.

The prayer of the bill is for a conveyance of the land in question and for an account.

Henry and Roberts for plaintiff.
J. W. Woodfin for defendant.

PEARSON, C. J. Rejecting the general charges of fraud made by the bill as surplusage, the equity of the plaintiff is put upon two grounds:

1. The defendant, in locating his grant, did not observe the directions of the statute, which requires that it should be in a square or an oblong

parallelogram, so as not to be more than twice as long as it is broad, but fraudulently located it in such a form as to include the plaintiff's improvement, whereas, by running up the mountain, the defendant could and ought to have located his 100 acres so as not to interfere with the plaintiff's improvement and prevent the location of the 100 acres to which he was also entitled under the certificate of preëxemption which he had obtained.

It appears by the survey and plat filed as an exhibit and evidence in the cause that the allegation that the defendant located his grant so as to be more than twice as long as it was broad is not true, for in fact it is nearly an exact square, and we have this question: Admit that the defendant, by running up the mountain, could have located his grant so as not to interfere with the plaintiff, was he bound to do so? We can see no principle, either in law or equity, by which the defendant was restricted in the location of his grant, except by the requirements (432) of the statute. If he did not violate them, although he located so as to cover the improvement of the plaintiff, it was, in respect to him, *damnum absque injuria.* It was his folly or misfortune to have made his improvement within two or three hundred yards of the defendant, and thereby put himself at the defendant's mercy, without making some arrangement beforehand in regard to the manner in which their respective preëxemption rights should be located, for, in the absence of such an arrangement, the defendant was at liberty to locate his grant so as best to suit himself; and, provided he did not violate the requirements of the statute, he was at liberty, so far as the rules of law and equity are involved, without reference to the rules of good neighborship or the golden rule, "do unto others," etc., to locate his grant as his interest dictated, and was not obliged to run up the side of the mountain to accommodate his neighbor.

2. The defendant is a citizen of the State of Georgia, and was then, and still is, a resident of that State, so as not to be entitled, under the statute, to a preëxemption right, the provisions of which statute were intended for the benefit of, and is confined to, "poor persons who are destitute of homes and have settled upon the unsurveyed lands in the county of Cherokee;" but, availing himself of a mistake on the part of the agent of Cherokee lands, in respect to the persons who fell within the meaning of the law and were entitled to preëxemption rights, he procured a certificate from the said agent, under which he had the land surveyed and obtained a grant whereby the plaintiff was excluded and deprived of his preëxemption right, and the equity is that it is against conscience for the defendant to take advantage of a mistake and claim the land to which he is not entitled, to the injury and exclusion of the

plaintiff, who would otherwise have been enabled to locate his preëxemption right and have obtained a grant for the land now in controversy.

The defendant attempts to meet the alleged equity by assuming two alternative positions, so as to put the plaintiff upon one or the other of two horns of a dilemma; that is, if the agent for the Cherokee lands had no power to issue the certificate to the defendant, then (433) the grant to him is void and the title is still in the State, so that the plaintiff has a clear legal remedy, and there is no equity involved in the case; but if the agent had power to issue the certificate to the defendant, then his action in regard to the person entitled to the certificate, being an adjudication of the question, is conclusive.

Our attention was called to this subject at August Term, 1855, when this case was before us on a demurrer. See *Barnett v. Woods,* 55 N. C., 199. We then gave to it some consideration, but did not come to a definite conclusion. We are now satisfied that, although the dilemma is very ingeniously put by the defendant's counsel, yet there is a fallacy in it, and the plaintiff's equity does not fall on either horn, but has a safe resting place between them.

It does not fall under the first position, for the agent of the State had power over the subject-matter—that is, "the land"—and in this particular, our case differs from the class of cases in which it is held that grants issued for land in respect to which the agents of the State had no authority to act are void; for instance, a grant issued under the ordinary entry laws for confiscated land which was not subject to entry, or for land in Cherokee County, or for land covered by navigable water, or for land in one county entered in another. See *Avery v. Strother,* 1 N. C., 558; *Strother v. Cathey,* 5 N. C., 102; *University v. Sawyer,* 3 N. C., 98; *Stanmire v. Powell,* 35 N. C., 313; *Ward v. Willis,* 51 N. C., 185, and falls under the principle established by *Edwards v. University,* 21 N. C., 325, where, as the agents of the State had authority to act in respect *to the land,* or subject-matter, it was held that a grant, although issued to a *person* who was not entitled was not *void,* but passed the title out of the State, and the remedy of the person truly entitled was to convert the party who had wrongfully obtained it into a trustee and call for a conveyance. Nor does the plaintiff's case fall under the second position, for although the subject-matter was embraced by the authority of the State's agent and in respect to matters of detail and (434) mere questions of fact, such as whether any improvements were made, and if so, by what person, and who of several making claim to be the occupant was in fact the occupant, the decision of the agent was intended to be final, yet in regard to the proper construction of the statute and the description of persons intended to be embraced by its provisions as objects of the bounty of the State in disposing of this portion of the

public domain, there is nothing to show that it was the intention of the Legislature to confer upon the agent this high judicial power so as to make his adjudication conclusive. And, indeed, if the Legislature had in express terms conferred this power, their authority so to do might well have been questioned, for the Constitution of the State recognizes and establishes this Court as a coördinate department of the government having "supreme judicial power," whose right and duty it is to decide, in the last resort, all questions of law, among which is embraced the construction of all acts of the General Assembly. In discharge of the duty thus confided and imposed upon it by the Constitution, this Court declares its opinion to be that the provisions of the statute in question confine the bounty of the State to actual occupants—*i. e.*, persons who have settled on these refused and unsurveyed lands in the county of Cherokee. It follows that the agent of the State erred upon a question of law in awarding a certificate of prëexemption right to the defendant, who was then, and still is, a citizen of Georgia, and who had no intention or expectation of becoming a citizen of this State, by reason whereof injustice was done to the plaintiff, who was then, and is now, a citizen of this State entitled to a preëxemption right to the land, including his improvements, according to the certificate of the agent of the State, and is wrongfully excluded therefrom by the certificate given to the defendant and the grant which he obtained by virtue thereof, whereby the title of the State was divested. And to remedy this wrong and injustice, there will be a decree that the defendant convey to the plaintiff
(435) in fee simple so much of the land embraced by the grant issued to him as is covered by and embraced in the certificate awarded to the plaintiff.

PER CURIAM. Decree accordingly.

LARKIN BRANNUM v. BENJAMIN ELLISON.

Where B. pretended that he held a bond on a certain individual to make him a title to a tract of land, and sold his interest in said land to A., partly for cash and partly for A.'s bonds, on its appearing that B. had no such title bond and no interest in the land, it was *Held* that A. was entitled to have the collection of the balance of the purchase money enjoined and a decree for repayment of the sum advanced, but that preliminary thereto he must surrender the possession of the land which he had obtained from B.

CAUSE removed from the Court of Equity of CHEROKEE.

The facts of this case are sufficiently stated in the opinion of the Court.

No counsel for plaintiff.
Gaither for defendant.

BRANNUM *v.* ELLISON.

MANLY, J. It seems the defendant, professing to be the owner of a bond on G. W. Hayes, to make title to a parcel of land in Cherokee, bargained and sold his interest in the same for the sum of $300 to the complainant, who thereupon, in consideration of a promise on the part of the defendant to get the bond and assign the same in proper form, paid the sum of $185.75 and gave his bonds for the residue of the purchase money. The equity of the bill rests upon the allegation that defendant has not assigned the bond as promised, nor in any other way made title to the land, but is now fraudulently insisting that he has done so, and is enforcing the collection of the purchase money. We have examined the testimony, especially the depositions of G. W. Hayes and N. Jarratt, and find the allegations of the bill sustained. The (436) defendant seems never to have had any bond or other assurance for title from Hayes or any one else which he could assign or transfer, and the complainant is therefore left entirely without title or security for title. It is unconscientious, therefore, in the defendant to enforce his demand for the residue of the purchase money or to keep the moneys that have been paid him upon the contract. It seems, however, that defendant had occupation of the land at the time of the agreement, which he delivered to plaintiff, and that plaintiff's son, claiming under the father, is still in possession. A condition precedent, therefore, to the relief which the bill asks is that the possession of the land now held by the son shall be again transferred to the defendant. Subject to this condition, we are of opinion the plaintiff is entitled to a decree for the moneys paid by him and interest, and to a perpetual injunction against the collection of the residue. A decree may be drawn in conformity with the opinion.

PER CURIAM. Decree accordingly.

JUDGE MANLY being a stockholder in the Atlantic and North Carolina Railroad Company, took no part in the decision in *McRae v. R. R., ante,* 395, nor in any other where that corporation was concerned.

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ADMISSIONS IN A CAUSE. *Vide* Practice, 8.

ADVANCEMENT.

1. Where a father joined in a deed with his sister, giving to certain of his children property that had been intended for them by another sister, whose will to that effect failed to be executed from accident, the father and sister being the next of kin and sole distributees of the deceased sister, it was *Held*, that in the distribution of the father's estate, these children were not bound to bring in this property as an advancement. *Hollister v. Attmore*, 373.

2. Where things given by an intestate father to his daughters were such as were needed on their starting in life and were calculated to aid and advance them, there being nothing to show that they were not intended as advancements, it was *Held* that they must be so considered. *Ibid.*

ALIMONY PENDENTE LITE.

It is not competent for the Superior Court, on a petition for divorce and alimony, on the question of allowing alimony *pendente lite*, for the defendant to read his answer much less affidavits in support of it. It is otherwise upon the question of the *amount* of the allowance, for in that case not only the answer, but affidavits also, can be read. *Shearin v. Shearin*, 233.

Vide Chose in Action, etc.

AMENDMENT. *Vide* Parties, 2.

ANSWER, VAGUENESS OF.

Where a defendant in a suit claimed an equitable interest by virtue of a deed of assignment, which recited that the conveyance was in consideration of the sum of $100 in hand paid, but there was no evidence of the payment of the purchase money except this recital, although such proof was expressly required, and the defendant in his answer did not distinctly aver that it had been paid, it was *Held* that the court would not regard the defendant as an assignee so as to defeat the claim of the plaintiff, who was seeking to attach this fund for the satisfaction of a just demand. *Fuller v. Smith*, 192.

ANTE-NUPTIAL AGREEMENT.

An agreement between parties previously to and in contemplation of marriage, that neither, after the death of one of them, shall claim anything that had belonged to the other before marriage, was *held sufficient in equity* to exclude the woman from dower, a year's provision, and a distributive share. *Cauley v. Lawson*, 132.

ASSENT OF EXECUTOR.

1. The executor's assent to a legacy once given is effectual to vest the estate of the legatee, although such executor may die before proving the will or qualifying. This is the rule of the common law, and the legislation of this State has not changed it. *Gums v. Capehart*, 242.

ASSENT OF EXECUTOR—*Continued.*

2. From a possession by a legatee, for six years, of the thing bequeathed, especially as against one purchasing from such legatee, the assent of the executor will be presumed, although, after proving the will, he died without qualifying or renouncing. *Ibid.*

ASSETS.

An executor is not chargeable with a sum of money which the testator had allowed his slave to acquire and which had been loaned out to an individual, and a note taken from him for the sum by another individual, payable to such individual for the benefit of the slave, because the executor had no remedy to collect it either in law or equity. *Lea v. Brown*, 379.

ATTACHMENT.

1. Where a bill seeking to attach an equitable interest of an absent debtor in the hands of an administrator in this State states that the defendant "is justly indebted to the plaintiff in the sum of $218.17, due by two notes, bearing date 20 March, 1850," it was *Held* a sufficient statement of the debt within the requirements of sec. 20, chap. 7, Rev. Code. *Fuller v. Smith*, 192.

2. "An affidavit of the truth of the matters contained in his bill" is necessary to give jurisdiction to the court of equity under the statute, Rev. Code, chap. 7, and the want of such affidavit is a good ground for a general demurrer. *Barringer v. Andrews*, 348.

Vide Endorsement, etc.

AUDITA QUERELA. *Vide* Execution, Satisfaction of.

AVERMENT OF DILIGENCE.

Where C., being indebted to his sister B., left the State, having made a conveyance of certain of his property to the plaintiff, and the latter agreed that if he got the property, or enough of it to satisfy his sister's debt, he would save it for her, and gave his bond for the amount thereof, and at the same time she gave him a written agreement to return the said bond if he did not succeed in getting the amount of said note from C.; on a bill for an injunction to restrain the collection of the bond, it was *Held* necessary that the plaintiff should aver that he had diligently endeavored to collect said amount from C., and had failed to do so, and that it was not sufficient for him to allege that he had failed to get the property, but that he should state how and why he had so failed. *Long v. Cross*, 323.

BEQUEST VOID FROM VAGUENESS.

Where a will contained the following clause, "Upon consultation, if Georgiana wishes to remain with her mother, provided it be possible, this house ought to be enlarged for her comfort, which I recommend, so as to make room for boarders," it was *Held* that such clause was too vague to be carried into effect. *Faribault v. Taylor*, 219.

BEQUEST OF A FAVOR TO A SLAVE.

A provision in a will allowing a slave to select a master, and fixing his price at $500, the slave being between the ages of 45 and 50 years, is not against the policy of our law. *Reeves v. Long*, 355.

BEQUEST OF A FUND TO A CLASS.

1. It is a settled rule of this Court that when a fund is given to a class, all who answer the description, when it is to be paid, are entitled to participate in the bounty. *Hawkins v. Everett*, 42.

2. A bequest of a fund, therefore, "to the heirs of the body of A.," to be paid as they come of age, will take in all the descendants of A. that were born at the testator's death and, also, those born after that event and between that and the time of the first child's arrival at age. *Ibid.*

BEQUEST TO SLAVES.

Where pecuniary legacies were given to slaves, it was *Held* that the amounts thus intended to be given away remained as integral parts of the estate for the want of a legal taker, and, as such, fell into a residuary fund provided in the will. *Meadows v. Moore*, 54.

BEQUEST TO A TRUSTEE WITHOUT CHARGE FOR PROFITS. *Vide* Estate, Extent of.

BILL. *Vide* Averment, etc.; Parties, 1, 2, 3, 4, 5, 6, 7.

BILL FOR A PARTIAL SETTLEMENT.

A bill in equity cannot be sustained which seeks relief in relation to one article of property only belonging to the estate of a decedent, without calling for a general account and settlement of the estate and making all persons interested in the same parties to the suit. *King v. Galloway*, 122.

BILL CONTAINING DELUSIVE STATEMENTS.

Where a plaintiff has an equity to enjoin the enforcement of a part of a judgment, but for the purpose of obtaining an injunction as to the whole alleges a ground of relief which is false in fact, and relies upon it alone, it was *Held* that a court of equity will dissolve the injunction as to the whole of the judgment. *Ward v. Smith*, 204.

BILL TO PROTECT REMAINDERMAN.

Where one coming in under a life tenant resides in another State and claims the whole property in slaves against conscience and equity, this, without any threat, was *Held* to be sufficient ground for a remainderman to allege an apprehension that they would be removed, and to authorize the issuing of a sequestration to restrain such removal. *Brantley v. Kee*, 332.

CEMETERIES.

Cemeteries, where the burial of the dead is carefully done, cannot be considered such nuisances as to induce a court of equity to interfere to enjoin the location of them near a dwelling. *Ellison v. Commissioners*, 57.

Vide Nuisance, 1, 2.

CHARGE FOR THE PAYMENT OF DEBTS.

1. A testator may, if he choose, exempt an undisposed of residue from the payment of his debts by throwing that burden on other property spe-

CHARGE FOR THE PAYMENT OF DEBTS—*Continued.*

cifically willed for that purpose; but in order to do this, his intention must be very clearly manifested. *Swann v. Swann*, 297.

2. The general rule is that intestate property is primarily liable for the payment of debts even though other property may have been directed by will to be sold for that purpose. *Ibid.*

CHARGE FOR EDUCATION.

1. Where a testator provided that one of his sons should be supported out of his estate while getting a profession, and charged his share with a certain sum with a view to that event, and such son declined, of his own accord, to study a profession, it was *Held* that he had no right to ask that his share should be discharged of that sum in the ascertainment of his proportion of the estate. *Holt v. Hogan*, 82.

2. Upon a bequest to children as tenants in common with a postponement of the division, in the absence of any direction to the contrary, the expenses for maintenance and education of each is a separate charge upon his share of the profits. *Branch v. Branch*, 268.

CHEROKEE LANDS.

1. It was *Held* not to have been the intention of the Legislature to confer upon the agent for the State of Cherokee lands the high judicial power of determining, *conclusively*, who were intended to be embraced in said act. *Burnett v. Woods*, 428.

2. If such had been the intention of the Legislature, *quere*, whether it would not have been in violation of the State Constitution. *Ibid.*

CHILD IN VENTRE SA MERE. *Vide* Conveyance to a Woman, etc.

CHOSE IN ACTION, ASSIGNMENT OF.

1. Where a wife filed a petition for a divorce and alimony, it was *Held* that a court of equity would not, in favor of such wife, restrain an assignee from reducing into possession a chose in action of the wife assigned him by the husband for value, without notice of an equity in the wife. *Gilmore v. Gilmore*, 284.

2. Where a husband assigned a chose in action of the wife for value and without notice of an equity in the wife, and the assignee commenced a suit in a court of competent jurisdiction to reduce it into possession, and got a decree for the same, it was *Held* that the filing of a petition for divorce and alimony by the wife did not constitute such a *lis pendens* as would restrain the assignee from proceeding to reduce it into possession. *Ibid.*

CITIZENSHIP. *Vide* Preëxemption Claim, 2.

CLASS TAKING AS SUCH, HOW AND WHEN MADE UP. *Vide* Limitation in Remainder, 2, 3, 4; Per Stirpes, 2.

CODICIL.

Where the meaning sought to be attributed to a codicil would be to take away the greatest part of a legacy given in the will, on the day be-

CODICIL—*Continued.*

fore, to a grandson, and cause an intestacy as to that much of the estate, to a part of which the legatee would be again entitled under the statute, there being no change in the state of the testator's affairs, and the language of the will being ambiguous, it was *Held*, according to rules of interpreting such instruments, not to have been the intention of the testator to revoke the former legacy. *Dalton v. Houston*, 401.

COMPOSITION, CONSTRUCTION OF.

Where a surety, intended to be indemnified by a deed of trust, made a composition, in writing, with the creditors, by which they agreed to take, and did take, a part of their debt, retaining the right to enforce their claims against others bound for the same debt, but discharging the said debtor from all further liability for the debt, it being left doubtful in the said writing which party should have the benefit of the security afforded by the deed of trust, it was *Held* that the nature and purposes for which the law allows deeds of trust preferring creditors at all are very weighty considerations in determining the question. *Wiswall v. Potts*, 148.

COMMISSIONS TO EXECUTOR.

1. One per cent was *Held* to be a sufficient commission to an executor on money received by him from a clerk and master arising on the sale of land. *Graves v. Graves*, 280.

2. Where the money of an estate was collected and paid out, mostly in large sums, without much litigation, it was *Held* that 3 per cent on the receipts and disbursements was a sufficient compensation to an executor. *Ibid.*

CONDITION RENDERED IMPOSSIBLE.

1. Where personal property was bequeathed upon a condition, which was rendered impossible to be performed, *such condition not being the sole motive of the bequest*, it was *Held* that the property vested. *Nunnery v. Carter*, 370.

2. Where personal property was bequeathed to a son, *provided he take care of his mother for her lifetime*, it was *Held* not to be the intention of the testator that the whole condition should be performed before the property vested, but that he should take an estate at once, to be forfeited on failing to perform the continuing duty. *Ibid.*

CONFIRMATION OF A GIFT.

Where a testator had placed in the hands of a married daughter a female slave, who had two children afterwards and before the death of the testator, and the donor by his will expressly confirms the *gift of the negroes already received*, and another clause in the same will required the whole estate, real and personal, to be divided after the manner of law and equity, it was *Held* to be the intention of the testator that the property should be valued as of the time of the original gift and the two children excluded from the valuation. *Faribault v. Taylor*, 219.

CONFIDENTIAL RELATIONS.

1. It is an established doctrine, founded on a great principle of public policy, that a conveyance obtained by one whose position gave him power and influence over the grantor, without any proof of fraud, shall not stand at all, if without consideration; and that where there has been a partial or inadequate consideration, it shall stand only as a security for the sum paid or advanced. *Futrill v. Futrill*, 61.

2. Where a deed was obtained by one standing in a confidential relation towards another of weak intellect, and the relation and imbecility continued from the time of the act till the bringing of a suit, to be relieved against the deed, it was *Held* that the statute of limitations, chap. 65, sec. 20, Rev. Code, did not avail the defendant. *Oldham v. Oldham*, 89.

3. Where the confidential agent of an aged woman, the manager of all her affairs, took from her a bond to secure an alleged indebtedness without rendering a full account and without giving her an opportunity deliberately to examine into the dealings, it was *Held* that such bond should only stand as a security for what might be due upon taking an account in this Court. *Franklin v. Ridenhour*, 420.

Vide Fraud on a Dependent.

CONFIDENCE, BREACH OF.

Where one got another to sign a note, with an understanding that it was not to be binding unless signed by a third person also, and such person's signature was not procured, whether on the note's being used to secure a preëxisting debt of the principal, the surety could avail himself of this breach of confidence. *Quere? Townsend v. Moss*, 145.

CONSTITUTIONALITY OF A LAW. *Vide* Cherokee Lands.

CONSTRUCTION OF A DEED.

Where a deed in trust grouped several creditors, A., B., C., and D., thus: "Secondly. To pay and discharge in full the several and respective debts, bonds, etc., due, or that may grow due to A., pay B., C., and D. the several and respective debts, bonds, etc., due, or that may grow due to them," it was *Held* that, by force of the words "pay in full," A. was entitled to priority over the others. *Biggs v. Capehart*, 340.

CONSTRUCTION OF A WILL.

1. Where a testator having seven daughters, provided for one by name, and then directed that the residue of his estate should be divided into *nine equal parts*, three of which were to go to his three sons and the other *six parts* to be allotted *to his daughters*, it was *Held* that the meaning of the testator was that each of the *six daughters* remaining to be provided for should have one of the six remaining equal parts. *Shepard v. Wright*, 20.

2. Where a testator bequeathed one-half of his whole estate to his wife absolutely, and after giving several other legacies, gave the undisposed of residue to several persons named, and then provided that "his wife's portion was to be taken off before the other distribution," it was *Held* to be the intention of the testator to give his widow one-half of the gross amount of his estate irrespective of charges of any kind. *Meadows v. Moore*, 54.

CONSTRUCTION OF A WILL—*Continued.*

3. Where a testator willed that four slaves, a husband and his wife and their two children, should be *freed*, and directed that they should be under the especial care of one of his sons, and bequeathed to the husband things that could not be carried out of the State with any convenience or profit, it was *Held* to be the intention that they should remain in the State, but that such of them as were over 50 years of age, and could show meritorious services, might be emancipated under sec. 49, chap. 107, Rev. Code. *Feimster v. Tucker*, 69.

4. Where a testator gave to his wife, for whom he had a great affection, and who had no other provision, all his property *to raise and educate his children, and to dispose of the same among all of them as their circumstances might seem to require, and to sell any of it for the benefit of her family*, and appointed her sole executrix, it was *Held* that the legal title to the real and personal estate was invested in the wife in trust to manage the property at her discretion for the support of herself and for the raising and education of his children, and that the equitable reversion in the residue, after those purposes should be answered, vested in the children, subject to be divested by the exercise of the power given her to dispose of it among all the children as their circumstances might require. *Little v. Bennett*, 156.

5. A conveyance of "all the property I possess," where there was no apparent motive for making an exception, was *Held* to mean all that the party owned, as well that in remainder as that in his immediate occupation. *Brantly v. Kee*, 332.

6. Where a testator by his will gave land and slaves to his daughter M. S., and if she died without children surviving her, "then the lands to my own heirs at law, and the slaves and their increase to my next of kin," and gave lands and slaves to a son, and provided that if he should marry the said lands and slaves should be held by his son and his wife and the children that might survive their parents, *upon the same terms* and subject to the same uses, conditions, and limitations mentioned in the devise to his daughter M. S., it was *Held*, that upon the death of the son without leaving a child, the lands devolved upon his (testator's) heirs at law, who were a daughter and two children of a deceased daughter, but that the slaves went to the daughter alone. *Harrison v. Ward*, 236.

7. A limitation to the *next of kin* in a will, without other explanatory words, was *Held* to mean the *nearest of kin*. *Ibid.*

8. Where a testator bequeathed one of the children of a female slave to each of the children of A., and in case there should be of the children of the said slave more than was sufficient to answer the said specific bequests, then the residue to two, it was *Held* that the children of A. were entitled to choose from among the increase of the woman what slaves they would have before the residue passed to the two. *Moye v. Moye*, 357.

Vide Composition, Construction of; Limitation in Remainder, 5; Per Stirpes, etc.

CONTINGENT BEQUEST.

1. A bequest to one *when* he arrives at age or marries would ordinarily not vest unless the condition be performed by the arrival at age or

CONTINGENT BEQUEST—*Continued.*

marrying, but the rule is otherwise when special circumstances appear from other parts of the will which show it to have been the testator's intention only to postpone the enjoyment, and not to make the ownership contingent. *Fuller v. Fuller*, 223.

2. Where an estate was given to an infant daughter *when* she arrived at 21 or married, and in the same will vested estates were given to the other children, and the will provided that the legatee should live with her mother until her arrival at full age or marriage, and that the mother during this time should have the use of the property bequeathed for the support of the legatee and another child, and by holding the bequest contingent, by another part of the will, part of the same property would return to and become vested in the personal representative of the same legatee, and a disturbance of other vested legacies would take place, it was *Held* that these circumstances showed it to be the intention of the testator that the legacy should be *vested* in interest, though the enjoyment was postponed. *Ibid.*

Vide Restricted Estate.

CONTRACT AS TO LAND.

1. Receipts for money paid upon a verbal contract, and which are relied on as evidence of the contract, form no exception to the rule that a writing containing a patent ambiguity cannot be helped by parol evidence. *Capps v. Holt*, 153.

2. Where the description of the land in a memorandum of contract is vague and indefinite, equity will not decree a specific performance. *Ibid.*

CONTRACT, INDUCEMENT TO.

Matters of inducement to a contract not expressed as a condition and not forming a part of the essence of the contract are not allowed to defeat an estate or prevent it from vesting. *Winton v. Fort*, 251.

CONTROL OF AN ACTION AT LAW.

Where it was alleged that a bill of exchange was forged, and a suit at law in the name of the payee to the use of a purchaser was about to be dismissed, it was *Held* that such payee, on being indemnified by the beneficial owner, should be enjoined from dismissing the suit at law until the question as to the genuineness of the paper could be tested, and that defendant should also be enjoined from using a release obtained from the drawer. *Dibble v. Scott*, 164.

CONVEYANCE TO A WOMAN AND HER CHILDREN.

A conveyance in trust for a woman and her children, she having children at the time, nothing appearing on the face of the deed to show a contrary intention, was *Held* to vest an estate in the mother, and the children then born and in one *in ventre sa mere* as tenants in common, but that children born afterwards were not entitled to come in. *Gay v. Baker*, 344.

COPARTNERSHIP. *Vide* Dissolution, etc.

COPIES OF AMENDED BILL. *Vide* Practice, 5.

COSTS. *Vide* Practice, 5.

COUNSEL FEES.

Where there was no contest about the probate of the will of a testator, and his estate, amounting to $30,000, was easily collected, requiring few suits, and there was no extraordinary difficulties in the management of the estate, it was *Held* that $1.200 paid out in attorneys' fees over and above $100 paid for particular services by other attorneys was apparently unreasonable, and should not have been allowed by a commissioner without proof in explanation of the nature and propriety of the charge. *Fairbairn v. Fisher*, 385.

COSURETIES.

Where A., B., and C. signed a bond, and C. paid off a judgment rendered thereon and took an assignment of it to his own use and sought to collect the whole of it of B., whom he alleged to be a coprincipal with A., who was insolvent, and B. filed a bill to restrain C. from collecting more than a proportional part of said judgment, on the ground that he (B.) was only a cosurety with C., and C. confessed in his answer that he signed the bond without any request by B., or any communication with him respecting it, but upon the assurance of A. that B. was a coprincipal, it was *Held* that the *onus* devolved upon C. to prove that B. was a coprincipal. *Kearney v. Harrell*, 199.

CREDITORS. *Vide* Legacy; Lien, 5.

DECREE.

Where a declaration was made that an executor had fraudulently combined with others to run off and waste the assets in his hands, so as to defeat the collection of a judgment at law, the administrator of such executor being a party to the suit at the time of such declaration, it was *Held* not to be good ground of exception to the report of a commissioner directed to take an account of the assets of such executor in the hands of his administrator, that no formal decree had been made against him as administrator at the time of the declaration. *Barnwell v. Smith*, 168.

Vide Description of Land, 1; Estoppel.

DEED DECLARED A SECURITY.

Where a party who had passed a tract of land by deed, absolute on its face, seeks to have a reconveyance upon the ground that the conveyance was intended as a security for money loaned, and the land had been twice conveyed, subsequently, with notice of the plaintiff's equity, it was *Held* that the first and second purchasers, as well as the third, were necessary parties. *Webber v. Taylor*, 38.

DEMAND AND REFUSAL. *Vide* Statute of Limitations, 1.

DEMISE FOR EDUCATION AND SUPPORT.

1. Where a testator gave to his wife the share she would take in case of intestacy, and gave the residue to his children, and directed that his

DEVISE FOR EDUCATION AND SUPPORT—*Continued.*

whole estate should be subject to the support of his family and education of his children, and provided that the education of his children should be under the direction of their mother, and that as the children should become of age or marry the executor should allot a share to each, it was *Held* to be the intention of the testator that the whole estate should go into the hands of his wife for the support of his wife and children, and that the executor's sole duty was to make the allotments as the children might arrive at age or marry. *Graves v. Graves*, 280.

2. Where a testator directed that his widow and children should remain together as a family, she keeping the whole estate for the support of the family and education of the children, with directions that each child should have a share on arriving at age or marrying, and the arrangement was defeated by the necessity of selling the homestead for the payment of debts, it was *Held* that the share of the children became immediately payable to their guardians. *Ibid.*

Vide Construction of a Will, 4.

DEMURRER. *Vide* Parties, 1; Attachment, 2.

DEPOSITION OF A PARTY.

A party defendant in a suit has a right to have an order for taking the deposition of a codefendant, *not concerned in interest*, in favor of the applicant. *Wilder v. Mann*, 66.

DESCENT OF COLLATERALS.

In the descent of real estate, under the act of 1808, the next collateral relations of the person last seized, who are of equal degree, take *per stirpes* and not *per capita*. *Haynes v. Johnson*, 124.

DESCENT TO NATURALIZED PERSONS.

Under Rule 9 of the Chapter of Descents, Rev. Code, chap. 38, the naturalized children of a sister, herself an alien born and not naturalized, and still alive, take the share their mother would have taken had she been naturalized or native born, which share must be equal to the shares of each of their mothers, brothers, and sisters. *Campbell v. Campbell*, 246.

And so of the children of a sister who is dead without having been naturalized. *Ibid.*

DESCENT OF A FUND.

Where a female infant's land was sold under a decree in equity for the benefit of the infant, and she married and died in 1850, before coming of age, leaving a child, who died in 1851, in infancy, its father surviving, it was *Held* that the money retained the character of real property, and that the heirs at law of the last-mentioned infant had an equity to follow the fund and recover it from the executor of its father, into whose hands it had come as administrator of his wife. *Wood v. Reeves*, 271.

DESCRIPTION OF A DEBT. *Vide* Attachment, 1.

DESCRIPTION OF LAND.

1. Where a petition for the sale of land in a court of equity described one tract as "the Mountain tract, containing about 100 acres," a sale was decreed of the lands mentioned in the pleadings, and the sale confirmed, on a bill to set aside the master's deed on the ground of fraud, it was *Held* that it would require full and incontestable proof to satisfy the court that *only* a part of the 100 acres had been intended to be sold by the master. *Adderton v. Surratt*, 119.

2. Where a testator, at the time of the making of his will, which was in 1852, owned a small piece of land called the "Godwin tract," to which he *afterwards* added, by purchase, two adjoining tracts (a part of one of which latter had been purchased from Godwin), and the whole had been cultivated as one farm, it was *Held* that the whole passed under the denomination of "the Godwin tract." *Rogers v. Brickhouse*, 301.

Vide Contract as to Land, 2.

DEVOLUTION, *JURE MARITI*.

An estate in slaves, limited by will to the sole and separate use of a *feme covert* without any express limitation over to another, devolves, after her death, upon her husband, *jure mariti*. *Little v. McLendon*, 216.

DILIGENCE. *Vide* Averment of Diligence.

DISSOLUTION, PROOF OF.

1. In a suit brought for the settlement of a copartnership, where it was established that the defendant had been a member of the firm, it was *Held* that the *onus* of proving an averment of the dissolution of the firm devolved upon him. *Gossett v. Weatherly*, 46.

2. Where one of a copartnership of three was permitted to withdraw from the firm, it was *Held* that no inference was to be drawn from this, that the copartnership was not continued between the other two. *Ibid.*

DISCOVERY. *Vide* Injunction, 5.

DISTRIBUTION. *Vide* Executor, 1, 2.

DIVISION, WHEN TO BE MADE.

Where a division of property is ordered by a will, the parties are entitled to have it made as soon after the death of the testator, as the executor is ready for a final settlement. *Roper v. Roper*, 16.

DOWER IN A TRUST.

Where one bid off land at the sale of a clerk and master in equity, and gave his bond for the purchase money, but died before the sale was confirmed, it was *Held*, on the sale's being afterwards confirmed, that his widow was entitled to dower in the land under the act of Assembly (Rev. Code, chap. 118, sec. 6), and that she had a right to have it disencumbered of the lien for the purchase money by the personal estate. *Klutts v. Klutts*, 80.

DOWER. *Vide* Ante-nuptial Agreement.

EDUCATION, ETC. *Vide* Construction of a Will, 4; Demise for Education, etc.

ELECTION.

Where, by a marriage settlement, the husband was entitled to an estate for the life of his wife, in slaves, and the wife to the remainder, and during the coverture the husband conveyed to a trustee, in trust, for the benefit of his wife for her life, with a remainder to A. and B., his children, and after discoverture the wife elected to take the life estate under her husband's deed, it was *Held* to be against conscience for her, after disposing of the life estate, to claim the remainder also. *Brantly v. Kee*, 332.

EMANCIPATION.

1. The Court is inclined to the opinion that no trust for emancipation can be supported unless express provision is made for the removal of the persons attempted to be freed beyond the limits of the State. *Gossett v. Weatherly*, 46.,

2. Where a will provided that a female child should be emancipated at the age of 20, and gave her a tract of land and but a small sum of money, although the testator had abundance of money, and enjoined it upon his executors to see that she received the benefit of the land, it was *Held* that the will showed an intention that she should remain in the State after being liberated, and the provision was, therefore, ineffectual. *Ibid.*

3. Where it appeared from the face of a will that certain slaves directed to be emancipated (ineffectually) were not intended to be included in a clause bequeathing a residue, it was *Held* that such slaves would go to the next of kin as property undisposed of by the will. *Feimster v. Tucker*, 69.

4. Where a testator directs in his will that his slaves shall be freed, it is the duty of the executor to see that the wish of the testator is carried into effect at the expense of his estate. *Hogg v. Capehart*, 71.

5. The hires of slaves ordered to be emancipated must be first applied to the expenses of their removal, and if they prove insufficient, the remainder must be paid out of the estate. *Ibid.*

6. A provision in a will for the emancipation of the increase of a class of slaves to be kept in this State, such increase to be liberated as each, severally, shall arrive at a certain age, and then to be sent to Africa, without any limitation in point of time as to the recurrence of such claims for emancipation, was *Held* to be against the policy of the State and void. *Myers v. Williams*, 362.

ENDORSEMENT, EFFECT OF.

Where a resident of another State endorsed a note to a citizen of this, it was *Held* that the law would presume, in the absence of proof to the contrary, that the endorsement was for the endorsee, and that he might attach the property of the maker, a nonresident, in the hands of an administrator in this State for its satisfaction. *Fuller v. Smith*, 192.

ENTRY, VAGUENESS OF.

An entry of a tract of land as being "in Richmond County, on the south side of Muddy Creek, beginning at or near the ford of the creek where

ENTRY, VAGUENESS OF—*Continued.*

the Rockingham road crosses," without any further indications of its locality, was *Held* to be too vague and uncertain to give it priority as to an individual claiming under another entry and grant. *McDiarmid v. McMillan*, 29.

ERROR IN A COURT OF LAW.

1. A court of equity will not interfere to enjoin the collection of a judgment upon an allegation of error in the court of law rendering it.

Stockton v. Briggs, 309.

2. Where, therefore, in an action at law for the breach of a contract, the breach assigned was the removal of certain machinery, which, by the terms of the contract, the defendant was bound to leave on the premises, the defendant offered to prove that the contract was rescinded by mutual consent, and the plaintiff agreed to allow the defendant to remove the machinery, and the court held the evidence inadmissible, whereby a verdict and judgment passed against the defendant, it was *Held* he had no relief against this error in a court of equity. *Ibid.*

ESTATE, EXTENT OF.

A bequest of slaves to a father, in trust, for the use and benefit of his children, but the said father "is not to be accountable to his children for the proceeds of the labor of said negroes until the said children are 21 years of age," was *Held* to vest a present absolute interest in the trust transmissible on a child's dying in infancy, according to the statute of distributions. *Myers v. Williams*, 362.

ESTOPPEL.

Where a deed of trust was made, limiting property in slaves to certain persons, and a petition was filed in a court of chancery setting out the rights of the parties to the deed, according to its terms, and praying for the appointment of a trustee to perform the trusts as therein set out, and such trustee was appointed by the court, and gave bond to perform the trust, and took the property into possession by virtue of such decree, it was *Held* that the parties to the proceeding were estopped to deny the ownership asserted in the proceeding, and that the trustee, as a privy in estate, was in like manner estopped. *Brantly v. Kee*, 332.

EXECUTION, SATISFACTION OF.

1. If an execution has been satisfied by a levy on property of the defendant, the court issuing the execution, upon a writ of *audita querela*, will order it to be called in and satisfaction entered of record, so that equity has no jurisdiction to interfere to stop a second satisfaction of the same execution. *Parker v. Jones*, 276.

2. The levying of an execution on property which is redelivered to the defendant in the execution on his giving a forthcoming bond is not a satisfaction of the execution. *Ibid.*

EXECUTOR.

1. A widow who dissents from her husband's will has no right to insist that certain slaves, who had committed a felony and were afterwards

EXECUTOR—*Continued.*

hanged, should be valued as though they were free from such criminal charge, it being *Held* by the court that slaves so circumstanced were of no value. *Harrell v. Davenport*, 4.

2. It is the duty of the executor taking charge of slaves accused of a felony to have them defended, and the expense of defending such as were convicted and executed was *Held* to be a charge upon the estate, and not upon the legatees for whom they were intended; but as to one who was acquitted and received by a legatee, it was *Held* that the charge for his defense should fall upon the legatee. *Ibid.*

Vide Assets; Charge for Payment of Debts; Loss of Assets.

EXHIBITS. *Vide* Practice, 2.

EXPECTANCY, SALE OF.

Equity will give effect to the assignment of a mere expectancy or possibility, not as a grant, but as a contract, entitling the assignee to a specific performance as soon as the assignor has acquired the power to perform it. *McDonald v. McDonald*, 211.

FAILURE OF CONSIDERATION.

Where B. pretended that he held a bond on a certain individual to make him a title to a tract of land, and sold his interest in said land to A., partly for cash and partly for A.'s bonds; on its appearing that B. had no such title bond and no interest in the land, it was *Held* that A. was entitled to have the collection of the balance of the purchase money enjoined and a decree for repayment of the sum advanced; but that as preliminary thereto, he must surrender the possession of the land which he had obtained from B. *Brannum v. Ellison*, 455.

FORMER DECREE.

Where a point in a former suit was pretermitted, which, if tenable, would have determined the judgment of the court the contrary way, it is no ground for impeaching the former judgment that the point was not made in the former suit. *Wiswall v. Potts*, 184.

FRAUD. *Vide* Specific Performance, 3.

FRAUD ON A DEFENDANT.

Where a son, living with his mother (a woman of weak intellect), having the management of her affairs and habitually controlling her conduct, used a bond that had been unfairly obtained from her without consideration, and which had been paid by others to him, as the means of obtaining from her a conveyance of a slave, it was *Held* that the deed was void, and that the court would compel its surrender for cancellation. *Oldham v. Oldham*, 89.

FRAUD ON A REMAINDERMAN.

Where one purchased slaves from a tenant for life and sold them to a negro trader, with a written stipulation to refund if they should be taken from him, provided he took them out of the State within ten

FRAUD ON A REMAINDERMAN—*Continued.*

days, it was *Held* that a purpose fraudulently to defeat the estate of ulterior claimants was established. *Gums v. Capehart*, 242.

FRAUDULENT DEED OF TRUST.

1. A stipulation in a deed of trust giving a preference to such of the creditors as will, on receiving one-half of their debts release the other half makes it fraudulent and void. *Palmer v. Giles*, 75.
2. All persons attempted to be secured in a deed of trust, fraudulent on its face, who claim a benefit under it become *particeps criminis*, and are precluded from such benefit. *Ibid.*
3. A purchaser, even for a full consideration, under a deed fraudulent on its face gets no title. *Ibid.*
4. Whether a deed, which is void on account of fraud in respect to some of the trusts not apparent on its face may not *under certain circumstances* be valid to pass title—*Quere? Ibid.*

FUND FOR EMANCIPATION. *Vide* Emancipation, 4, 5.

FUND FOR PAYMENT OF DEBTS.

Property undisposed of by will must be applied in payment of debts before legacies charged with the payment of debts can be subjected. *Wynns v. Burden*, 377.

GIFT BY HUSBAND TO HIS WIFE.

Where a wife insists that her husband made to her an actual gift of property, so as, in equity, to bind him and his personal representatives, she must show herself meritorious, and show, moreover, a clear intent on the part of the husband presently to divest himself of the property and to invest her with a separate estate therein, and that such provision was reasonable. *Paschall v. Hall*, 108.

GRATUITY TO A SLAVE.

It would seem to be against the policy of the law for a master to allow his slave freedom and privilege to work and traffic *in this State* to the extent of acquiring so large a sum as $1,500. *Lea v. Brown*, 379.

HALF-BLOOD.

Half-brothers and sisters not of the blood of the purchasing ancestor cannot take under the statute of descents; where, therefore, one died seized of land descended through his mother from her father, and left no issue, nor brother nor sister, except half-sisters not of his mother's blood, it was *Held* that the father, surviving, took the inheritance. Rev. Code, chap. 38, sec. 6. *Little v. Buie*, 10.

HEIRS, BEQUEST TO. *Vide* Bequest to a Class.

HIRES OF BEQUEATHED SLAVES. *Vide* Emancipation, 5.

HOTCHPOT. *Vide* Advancement.

HUSBAND AND WIFE. *Vide* Chose in Action, etc.; Parties, 4; Separate Estate, etc., 1.

IMMORAL CONSIDERATION.

Where the charter of a railroad company required that "its treasurer and president should, before receiving an installment from the State, satisfactorily assure the board of internal improvements by a certificate, under the seal of the company, that an amount of the private subscription has been paid in equal proportion to the payment required of the State," it was *Held*, that for the railroad company to take, as cash, the notes of individuals made for the occasion, to enable the officers to make the certificate, under a promise that such notes were not to be enforced, was immoral and against public policy, and that such individuals being in *pari delicto* had no equity to be relieved against such notes. *McRae v. R. R.*, 395.

INCONSISTENT ALLEGATIONS.

Where the main drift and scope of a bill was to enforce an assignment in trust and secure a dividend under it, and the prayer of it was to that effect *only*, it was *Held* that an allegation that the deed was made to defraud creditors made heedlessly and as an expletive, and not as a ground of relief, should be rejected as surplusage. *Symons v. Reid*, 327.

INCREASE OF SLAVES.

1. The act of 1844 (chap. 119, sec. 6, Rev. Code), declaring as of what time a will shall speak, was *Held* to give no force to the subsequently passed act in regard to the increase of slaves (Rev. Code, chap. 119, sec. 27), so as to pass the increase of slaves under a will made before this latter act was passed, although the testator died after it went into effect. *Williamson v. Williamson*, 142.

2. By a will made in 1852, a slave born before the making of the testator's will was *Held* not to pass under the term "increase." *Rogers v. Brickhouse*, 301.

3. The word "increase" includes children, grandchildren, etc., issue of the body; where, therefore, a will gave a female slave and her child to A., and then gave the woman and her *increase* over after the death of A., it was *Held* that this bequest over included the child mentioned in the first bequest. *Moye v. Moye*, 359.

INDEMNITY, USE MADE OF.

Where goods were placed by a debtor in the hands of his surety for the purpose of indemnifying him against certain debts, which he immediately paid off, it was *Held* that the fact of the surety's making the application of the fund to the payment of these debts, instead of handing it to the other for him to do it, as was stipulated in the contract, gave the principal debtor no right to convey his claim on the said surety, in respect of these goods, for the security of other debts, or make the surety again account for the value of them, without allowing him credit for the application of the fund made by him. *Williams v. Howard*, 38.

INDULGENCE TO A SLAVE.

A provision in a will allowing a slave the privilege of choosing his own master is not against the policy of the law. *Harrison v. Everett*, 163.

Vide Gratuity to a Slave.

INFANT, CONTRACT OF. *Vide* Specific Performance, 3.

INJUNCTION.

1. Where the slave of A. was levied on under an execution against B., and there was no allegation of irreparable injury, nor of the pendency of a suit at law, nor of other equitable ingredient to distinguish the case from a simple *tort*, for which adequate reparation could be made by the recovery of damages at law, it was *Held* that a court of equity had no jurisdiction to enjoin a sale of the slave under the execution. *Du Pre v. Williams*, 96.

2. Except to stay waste or prevent some irreparable injury, the writ of injunction is only issued as ancillary to some primary equity which the plaintiff seeks to enforce by his bill. *Scofield v. Van Bokkelen*, 342.

3. Except to stay waste or prevent irreparable injury, an injunction can only issue as ancillary to some primary equity. *Stockton v. Briggs*, 309.

4. Where a trustee appointed by deed to collect money and pay all the debts of the trustor resided in a distant State, and in a bill by a creditor to enforce the payment of his debt it was alleged that he was about to remove the trust funds beyond the reach of the court, it was *Held* that an injunction was proper to restrain such removal. *Symons v. Reid*, 327.

5. Where one of several creditors secured in a deed of trust filed his bill to enforce the satisfaction of his debt, in which he called on the trustee to set forth the names of the other creditors and the amounts due them and the general state of the fund, and the answer failed to make such discovery, whereupon the plaintiff excepted to the answer, and the exceptions were allowed, it was *Held* that an injunction obtained to prevent the removal of the funds would be continued until a full answer should be filed, and then disposed of according to the equity confessed in the answers. *Ibid.*

6. An injunction is only granted as ancillary to some primary equity, except to stay waste and to prevent irreparable injury. *McRae v. R. R.*, 395.

Vide Bill Containing Delusive Statements; Error in Court of Law; Execution, Satisfaction of; Failure of Consideration; Jurisdiction, 5.

INQUIRY BY MASTER. *Vide* Practice, 9.

INQUISITION OF LUNACY.

A court of equity has no authority to make an order for an inquisition by a jury as to the lunacy or idiocy of a party. *Dowell v. Jacks*, 417.

INTEREST.

1. Where a legacy is payable out of a fund consisting of bonds and notes drawing interest, and the legatee refuses to take the securities themselves, he is, nevertheless, entitled to interest from the death of the testator, but on account of his refual to take the notes, he shall not recover his costs in a suit for such interest. *Beasley v. Knox*, 1.
2. The general rules as to interest upon general legacies is that none can be calculated before the time appointed for their payment. *Harrell v. Davenport*, 4.
3. The legatees of slaves specifically bequeathed are entitled to their hires from the death of the testator. *Ibid.*
4. Partial payments of a legacy made by the executor should be applied to extinguish the interest due at the date of the payments in the first place, and the residue, if any, to be applied to the extinguishment of so much of the principal. *Johnson v. Johnson*, 167.
5. Where a pecuniary or general legacy is given, but not payable until the legatee attains the age of 21, with a bequest over divesting the legacy in case he dies under age, the personal representative will take the accumulated interest. *Keehln v. Fries*, 273.

INTESTATE PROPERTY. *Vide* Charge for Payment of Debts.

INTERFERENCE WITH AN ESTATE WITHOUT ADMINISTRATION.

Where the heirs at law and next of kin of a deceased person took possession of his estate and divided it out among themselves, and sold some of it, it was *Held* that the court of equity could not protect them by restraining an administrator regularly appointed from recovering the property in actions at law. *Carter v. Greenwood*, 410.

JUDICIAL POWER. *Vide* Cherokee Lands.

JURE MARITI. *Vide* Devolution, etc.

JURISDICTION.

1. An allegation that a corporation was not properly organized, and, therefore, had no authority to collect a subscription made to its capital stock, is a question that can be tried in a court of law. *Thompson v. Guion*, 113.
2. An allegation that a subscription to the stock of an incorporated railroad company was to be paid in work and material; also, that it was made upon a condition that the road was to be located on a particular site, are matters cognizable by a court of law. *Ibid.*
3. Where the charter of a railroad company was altered after a subscription was made to its stock, so as to substitute one terminus for another, and done without the consent of the subscriber, it was *Held*, that having no power to go into a court of equity to enforce the original charter against the authority of the Legislature, he was exonerated from his subscription, and that he might make such defense in a court of law in a suit for the subscription. *Ibid.*
4. Where it was alleged by the defendant, in an execution, that satisfaction had been made on a former execution issued on the same judg-

JURISDICTION—*Continued.*

ment, it was *Held* that a bill for an injunction to restrain the second execution was not the proper remedy, for that, at law, a motion on notice in the nature of a writ of *audita querela* to call in the execution and have satisfaction entered of record was the proper mode of redress. *McRae v. Davis*, 140.

5. Where it was alleged that one, without authority and against the wishes of the justices, in whom the title was vested, seized on a public square and was proceeding to build a house for a courthouse, which would imperfectly answer the purpose, and that this trespass would produce an injury which would be *irreparable, or only to be repaired after great delay of time and at great expense*, it was *Held* not to be a proper case for the court to interfere by injunction to restrain the progress of the building. *Justices v. Cosby*, 254.

6. Where a bond, payable to a testator, was, by order of the court of equity, taken out of the hands of the executor and committed to a receiver for collection, it was *Held* not to be a ground for suing in a court of equity that the defendants were setting up acceptances made by them of bills drawn by the executor as payments to the executor by agreement with him, since the question can be fully tried in a court of law. *Curtis v. McIlhenny*, 290.

Vide Error in Court of Law; Execution, Satisfaction of, 2; Inquisition of Lunacy.

LACHES. *Vide* Mistake.

LAND CONVERTED INTO MONEY. *Vide* Descent of a Fund; Dower in a Trust.

LEGACY INTENDED FOR THE FATHER, ETC.

The statute (Rev. Code, chap. 119, sec. 28) giving the legacy intended for a deceased child to his or her children, where the parent died in the lifetime of the testator, was *Held* not to be intended for the benefit of the creditors of such deceased parent. *Smith v. Smith*, 305.

LEGAL DEFENSE. *Vide* Jurisdiction, 6.

LIEN.

1. Where a bill was filed against the representative of a fraudulent executor to subject his estate to the payment of a judgment at law, it was *Held* that such representative had no right, after the bill was filed, to pay other debts due by such executor of no higher dignity than that sought to be satisfied in this Court. *Barnwell v. Smith*, 168.

2. The right of a creditor to have a specific lien which is about to fail from the mistake of a draftsman set up in a court of equity is superior to that of the general creditors of an insolvent who have no lien. *Huffman v. Fry*, 415.

LIMITATION IN REMAINDER.

1. Where slaves were bequeathed to A. for life, and then to B., a daughter, a married woman, and, during the life of A., the husband of B. died

LIMITATION IN REMAINDER—*Continued.*

leaving a child of the marriage; B. then married again, and had another daughter, when she (B.) died, and her second husband also died (A., the life tenant, still living), it was *Held*, on the termination of the life estate, that the administrator of B. was the proper person to obtain the possession of her share of the slaves, but that he held the same in trust for the second husband's legatee, and that the daughter of the first marriage was entitled to no part of it. *Woodley v. Gallop*, 138.

2. Where a testator gave slaves to a trustee in trust for his daughter and her children, "free and exclusive of any control of her husband," she having children at the time, it was *Held* to manifest an intention to provide specially for the daughter, and that she consequently took an estate for life in the negroes, with a remainder to her children born, or that might be born thereafter. *Faribault v. Taylor*, 219.

3. Where a testator gave certain property to his wife for life, and after her death in trust for the children of one of his sons, to be divided among them as they came of age, it was *Held* that all the children born before the eldest arrived at age were entitled to share in the property. *Simpson v. Spence*, 208.

4. Where a testator gave property to children, as a class, and directed the profits to be "applied annually to their use," it was *Held* that, at the division of the property, the surplus rents and profits should be so divided that each child should get only a *pro rata* share of what had accrued since its birth. *Ibid.*

5. Where a testator in a residuary clause gave the surplus of his property to a son and daughter, in these words: "And my desire is that such surplus be equally divided and paid over to my son A. and my daughter M.; my will and desire is that my daughter M.'s equal part, in this last devise, to her bodily heirs, equally to be divided between them," it was *Held* that the daughter took an estate for life, with remainder to her children. *Pless v. Coble*, 231.

6. A testator bequeathed slaves to A. "during her life, and at her decease to the lawful heirs of her body, if any such there be; and if none, to return to the lawful heirs of my body," it was *Held* that on the death of A. without having had a child, the limitation over was valid. *Newkirk v. Hawes*, 265.

LOST NOTE.

Where an equity was established against the defendant for one of two lost notes, but which of them was not made to appear from the evidence, it was *Held*, the *onus* being on the plaintiff, he should take his recovery on the smaller. *Townsend v. Moss*, 145.

LOSS OF ASSETS.

1. Where a testator ordered his executor to loan out a certain fund, directed to be raised upon his estate, and the interest applied to the support and education of his children, and a portion of the fund was lost by the insolvency of the parties to whom it was loaned, which insolvency occurred so suddenly that the debt could not be saved by the

LOSS OF ASSETS—*Continued.*

exercise of *ordinary care*, it was *Held* that such loss ought not to be put upon the executor. *Nelson v. Hall*, 32.

2. Executors are not held responsible as insurers; *good faith* and *ordinary care* is all that is required of them. *Ibid.*

MARITAL RIGHTS. *Vide* Limitation in Remainder, 1.

MARRIAGE CONTRACT.

Where parties have bound themselves by a contract to marry, neither can give away his or her property without the consent of the other, and notice before the marriage of such a gift does not hinder the party injured from insisting on its invalidity. *Poston v. Gillespie*, 258.

MERITORIOUS SERVICES. *Vide* Construction of a Will, 3.

MISTAKE.

Where the aid of a court of equity is invoked to set aside a note and refund money on account of a mutual mistake of fact, and it appears that the party complaining had the means of correct information within his power, but negligently omitted to avail himself of them, it was *Held* that he was not entitled to the relief sought. *Capehart v. Mhoon*, 178.

MULTIFARIOUSNESS.

Where an object is sought to be obtained by a bill, and several grounds are set out to show the plaintiffs' right to the relief sought, it was *Held* that the bill was not on that account multifarious. *Cauley v. Lawson*, 132.

NATURALIZED PERSONS. *Vide* Descent, etc.

NEW TRIAL AT LAW. *Vide* Error in Court of Law.

NEXT OF KIN. *Vide* Construction of a Will, 7.

NUISANCE.

1. Where a nuisance apprehended is doubtful or contingent, equity will not interfere, but will leave the party to his remedy at law. *Ellison v. Commissioners*, 57.

2. Equity will not interfere to restrain parties from clearing their marshlands upon the allegation in a bill that it will impair the health of a neighborhood. *Ibid.*

Vide Cemeteries.

ORGANIZATION OF A CORPORATION. *Vide* Jurisdiction, 1.

PAROL TRUST.

At common law it was not necessary that a trust should be declared in any particular mode. In England, the statute of frauds requires that

PAROL TRUST—*Continued.*

declarations of trust shall be *manifested and proved* by some writing, but in our State there is no such statutory requirement; and so the matter stands as at common law. Where, therefore, one bought and paid for a tract of land and caused the title to be made to A., declaring at the time by parol a trust for B. and others, it was *Held* that such trust would be enforced in equity. *Shelton v. Shelton*, 292.

PARTIES.

1. Where a bill has parties plaintiff that have no interest in the questions presented, the objection may be taken by demurrer. *Little v. Buie*, 10.
2. The objection of a want of parties does not necessarily require the court to dismiss the bill, but it may be ordered to stand over, with leave to the plaintiff to amend his bill. *Webber v. Taylor*, 36.
3. Where A., as principal, and B., as surety, gave a note on an executory contract for the purchase of real property, in which a fraud was practiced on A., it was *Held* that a bill filed by B. alone, praying for an injunction to stay an execution at law and setting up no other equity, is defective in substance. *Emmons v. McKesson*, 92.
4. Where, by marriage articles, it was agreed that the wife should have the use of her slaves for life, and that they should then go to her children, it was *Held* that the husband of a daughter, who was the only child of the marriage, who became husband in the lifetime of his wife's mother, could not sue the executor of her father for the slaves in his own name, but must use the name of his wife jointly with his own. *Harrington v. McLean*, 135.
5. A trustee cannot proceed to vindicate the title entrusted to him from an adverse claim, by a bill, without making the *cestui qui trust* a party. *Blake v. Allman*, 407.
6. In a bill for a sequestration to protect the interest of a remainderman, it is necessary that all the joint owners of the remainder should be made parties. *Brantly v. Kee*, 332.
7. In a bill claiming a legacy under a bequest *to the lawful heirs of my body*, it was *Held* that the surviving children of the testator and the personal representatives of such as were dead at the time of taking were the proper parties plaintiff. *Newkirk v. Hawes*, 265.

Vide Pleading, 1, 2, 3, 4.

PARTNER, COMPENSATION OF.

A partner in a firm for the transaction of business is not entitled to charge for his personal services unless there be a contract entitling him to receive compensation. *Butner v. Lemly*, 148.

PAYMENT TO A FORMER EXECUTION. *Vide* Jurisdiction, 4.

PER STIRPES AND PER CAPITA.

1. A bequest of a residuary fund to A. and B., who are "to share equally with the children of C.," was *Held* to give to each of the children of C. a share equal to the respective shares of A. and B. *Harrell v. Davenport*, 4.

PER STIRPES AND PER CAPITA—*Continued.*

2. The general rule in the construction of wills is that persons described as a class take in the same way as if each individual comprising the class were called by his proper name; yet where such a construction would have the effect to break up every division of the property that might be made under the will, and require a new one whenever and as often as a child might be born in any of four families (other phrases of the will also aiding the court), it was *Held* that the testator did not intend a division *per capita*, but *per stirpes*. *Roper v. Roper*, 16.

3. Where a fund is given to a family of children, with a provision that each after-born child shall come in for a share, the court ordered that as any one child may come of age and claim his share, he shall give security to contribute *pro rata* to the share of any new participant that may be added to the class. *Ibid.*

4. A devise of land to be sold and the proceeds divided among the testator's "heirs at law," there being no context showing that the words were not used in their technical sense, was *Held* to require a distribution *per stirpes*. *Rogers v. Brickhouse*, 301.

5. And it was *Held, further*, that where personal property was embraced in the same clause with land, and there was no reason why a different rule of construction should be applied, the distribution as to it should be made in like manner. *Ibid.*

6. Where a testator devised to his own heirs, equally, to be divided between them, it was *Held* that the division must be *per stirpes*. *Burgin v. Patton*, 425.

7. Where, in the same clause, personal estate was given by will, with realty, and it was held that as to the latter the division must be *per stirpes*, it was *Held* that the same rule must apply to the personalty. *Ibid.*

8. Where a testator evidently designed to cut off a class of his grandchildren as a unit, but it did not do so, and they came in under the description of heirs, it was *Held* that they must come in as a unit and take *per stirpes* as the representatives of their mother. *Ibid.*

9. Where a testator gave real and personal property to his own heirs, equally to be divided, and it was held that by this clause the children of one deceased daughter took *per stirpes*, it was *Held, further*, that the children of a deceased son, claiming under the same description, must take in like manner. *Ibid.*

PLEADING.

1. One creditor secured in a deed of trust cannot maintain a bill for an account of the fund without making all creditors who are preferred, and all in the same class with him, parties, either plaintiffs or defendants. *Murphy v. Jackson*, 11.

2. Where a surety seeks to have his debt paid to the creditor out of some specified fund or by some other party than himself, such creditor is a necessary party to the bill. *Ibid.*

3. *Aliter*, where he has paid the debt and is seeking to be reimbursed by the principal or cosurety. *Ibid.*

PLEADING—*Continued.*

4. Where a bill alleged a fraudulent combination between the maker of a deed of trust and one of the trustees therein named, and it was sought to set aside a preference given to such trustee, it was *Held* that the trustor, as well as the trustee, should have been made a party. *Ibid.*

5. Where it was stated in a bill that certain notes were, by agreement of the parties, not to be collected in cash, but to be paid off in the notes of other persons, and it was alleged that such notes had been tendered and refused, it was *Held* necessary that the plaintiff should aver that he still had the notes, and was ready to deliver them. *McRae v. R. R.*, 395.

Vide Parties, 1, 2, 3, 4, 5, 6, 7.

POLICY IN REGARD TO SLAVES. *Vide* Indulgence, etc.; Emancipation.

POWER.

1. Whether a will made by one having a power to appoint, which does not refer to the power nor notice specially, any of the property subject to it is an execution of such power, *quere? Holt v. Hogan*, 82.

2. Where a person having a power of appointment for the benefit of others used it for his own benefit, it was *Held* that such exercise of the power was entirely inoperative. *Ibid.*

3. Where property was left by a will to testator's wife for life, with power to distribute it among her children, and she did not exercise the power, there being no general residuary clause, it was *Held* that, after the falling in of the life estate, the property passed to the distributees of the deceased under the statute. *Ibid.*

4. Where a testator gave all his property to his wife to dispose of it among all his children, and she made a will giving *part* of it to grandchildren and other more remote descendants, with contingent limitations and cross-remainders to them as purchasers, and part to some of the children for life only, it was *Held* that her will was not a valid exercise of the power, and that the rights of the children were not affected by it. *Little v. Bennett*, 156.

5. It was *Held, further*, that she had a right to contract debts for raising and educating the children and supporting the family on the credit of the estate, and that it was liable for such debts. *Ibid.*

6. *Held, further*, that the executor acted properly in keeping up the family establishment until the questions growing out of the will could be settled. *Ibid.*

7. *Held, further*, that the interest of the children in the trust was vested, and that one of the daughters having married and died in the lifetime of the mother her rights vested in her personal representative, who was her husband, but not *jure mariti*. *Ibid.*

PRACTICE .

1. It is irregular for a clerk and master, even by consent of counsel, to send up the original papers of a cause on an appeal from an interlocutory order, or, by consent, to charge in such case *as if* copies had been made and sent up. *Emmons v. McKesson*, 92.

PRACTICE—*Continued.*

2. It is not an approved practice in a bill to pray that exhibits may be made a part thereof, but if a plaintiff choose to make them a part of his bill he cannot object (being ordered to pay costs) to their being copied as part of the bill served on the defendant and his being charged with costs accordingly. *McRae v. Guion*, 129.

3. A clerk and master has a right to charge by the copy-sheet for copies of the bill which were issued to be served on the defendant. *Ibid.*

4. A clerk and master has no right to charge for a seal on a *fi. fa.* issued to his county. *Ibid.*

5. Where a bill was amended so as to make a corporation a party, it was *Held* to be proper to serve the president of the corporation with a copy of the bill, although he was already before the court in his individual capacity. *Ibid.*

6. The clerk is only entitled to charge for one subpœna beyond the number necessary to be issued to the defendants (one for each defendant). *Ibid.*

7. Where, on an appeal, the decretal order was in part reversed, the appellee was ordered to pay costs. *Ibid.*

8. An admission of a fact made in the court below by the parties to a suit for the express purpose of saving the trouble and expense of taking the proof will be taken as sufficient here, as well in suits by attachment as in other actions. *Fuller v. Smith*, 192.

9. Where a cause is set for hearing upon bill, answer, replication, and proofs, and the evidence fails as to a matter essential to the equity of the plaintiff or to the defense relied on, it is not in the course of the court to direct an inquiry by the master, nor to direct an issue to be tried at law. *Kearney v. Harrell*, 199.

10. Where a deed of trust was made by a firm to secure *all its creditors*, one creditor, to whom the rest were unknown (they not being named in the deed), has a right to file his bill in his own name, praying for a discovery of the other creditors and the state of the fund and for the payment of his proportion, and upon such discovery being afforded, it was *Held* to be the proper practice to amend the bill by making all the creditors interested parties to the bill. *Symons v. Reid*, 327.

Vide Alimony; Attachment, 2; Injunction, 5; Jurisdiction, 4.

PRE-EXEMPTION CLAIM.

1. In locating a preëxemption right under the act of 1850, sec. 7, in respect to Cherokee land, one entitled to locate under the agent's certificates is not bound to respect the advantage or convenience of one who had an improvement in the vicinity, and who also had a certificate of a preëxemption right, but obtained subsequently to the other. *Barnett v. Woods*, 428.

2. A citizen of a contiguous State who made an improvement on land, designated in the act of 1850, but never resided on it, was *Held* not to be entitled to a preëxemption right under said act. *Ibid.*

3. Where a person having made an improvement and complied with the act of Assembly, allowing a preëxemption right, got a certificate of

PRE-EXEMPTION CLAIM—*Continued.*

purchase and had a survey made, but was excluded from it by a grant made to an inhabitant of another State under a mistaken construction of the act by the State's agent, it was *Held* that he had an equity to have a conveyance from such grantee for the part of his survey covered by such erroneous grant. *Ibid.*

PREFERRED LEGATEES. *Vide* Construction of a Will, 7.

PRESUMPTION FROM LENGTH OF TIME.

1. An administrator who pays a debt presumed, from lapse of time, to have been paid is bound, in a settlement of the estate, to show that such presumption is not true, but that the debt is in fact still unpaid. *Barnawell v. Smith*, 168.

2. Where an administrator of an estate died without having rendered an account or made a settlement, and administration *de bonis non* was not taken on the estate of the intestate until after the lapse of thirty-four years, it was *Held*, in a suit begun immediately after the grant of such administration, that no presumption of settlement, satisfaction, or abandonment arose from the lapse of this time, but that such administrator *de bonis non* was entitled to an account against the representative of the deceased administrator. *Glen v. Kimbrough*, 173.

3. Where the payee of a sealed note took a mortgage of slaves for the security thereof, which he permitted to lie for at least sixteen years without the payment of any part, even interest, and during that time the slaves remained in possession of the mortgagor, who sold some of them for the satisfaction of other debts, it was *Held* that this amounted to a presumption that the right to foreclose had been abandoned. *Blake v. Lane*, 412.

4. Where the question was, whether the length of time during which the mortgagee of slaves had foreborne to enforce his security did not create a presumption of the abandonment of the right to foreclose, it was *Held* that the insolvency of the mortgagor was not evidence to rebut the presumption. *Ibid.*

5. Where the mortgagor is permitted to remain in possession of the mortgaged premises for more than ten years, during which time no part of the mortgage money, or even interest, had been demanded or paid, and nothing said or done concerning the matter, a presumption arises that the matter has been arranged in some other way, and the right to enforce the mortgage has been abandoned. *Brown v. Becknall*, 423.

6. Loose declarations made *after* the presumption of abandonment from the lapse of time has arisen will not be allowed to rebut it. *Ibid.*

Vide Assent of Executor.

PRINCIPAL AND AGENT. *Vide* Confidential Relations, 3.

PROOF, SUFFICIENCY OF.

Where the plaintiff alleged that a certain note to a bank, purporting to be the note of another (since insolvent), with the plaintiff and defendant as sureties, was fraudulently misrepresented to him by the defendant (he being illiterate), and he was made to believe that it was

PROOF, SUFFICIENCY OF—*Continued.*

the defendant's note, as principal, with such third person and himself as sureties, and that he signed it under that belief; the fact that the plaintiff had sued the defendant in a suit at law for contribution as cosurety, and got judgment, taken in connection with the form of the note and the pointed evidence of the subscribing witness contradicting the whole equity, were *Held* to be preponderate against two witnesses sustaining it. *Jones v. Underwood*, 26.

PURCHASER WITH NOTICE OF A FRAUD. *Vide* Fraudulent Deed of Trust.

QUASI EMANCIPATION. *Vide* Gratuity to a Slave.

RECEIVER. *Vide* Jurisdiction, 6.

REGISTRATION OF A VESSEL.

A steamboat used exclusively for the purposes of navigation between the ports or towns of any State, without going out of the State, is not a vessel of the United States, and is not required to be registered in order to a valid transfer thereof. *Wiswall v. Potts*, 184.

RELEASE. *Vide* Control of Action, etc.

REMAINDER IN SLAVES.

1. The act of 1823, Rev. Code, chap. 57, sec. 21, enabling a remainder in slaves, after a life estate, to pass by deed has no effect upon a deed executed prior to its enactment. *Harrell v. Harrell*, 229.

2. A deed of bargain and sale to one for life, *in trust for his own use*, conveys simply an estate to him for life, which, before the act of 1823, amounted to the whole interest, and a limitation over after such a provision passed nothing. *Ibid.*

REPAIRS, COMPENSATION FOR.

Where B., by parol contract, agreed to sell to A. a tract of land, and gave him possession and permitted him to make repairs and improvements, afterwards, on B.'s repudiating the bargain and pleading the statute of frauds to a suit for a specific performance, it was *Held*, in that suit, that he should account to A. for the outlay in repairs and improvements. *Winton v. Fort*, 251.

RESTRICTED ESTATE.

Where land was devised to A. and his heirs, with a restriction that if he died without leaving children, then to B. and C.; but if he wished to sell, he should give them the preference, and provided a mode for ascertaining the value, it was *Held* that a power of alienation was conferred on A., and that B. and C. should be put to their election, under the direction of the court, either to take the land in the manner prescribed, or to decline it. *McDaniel v. McDaniel*, 351.

REVOCATION OF WILL.

A revocation of a will in express words will prevail, though the object for which it was made fails, as being against public policy. *Gossett v. Weatherly*, 46.

SEAL. *Vide* Practice, 4.

SEPARATE SEAL OF FEME COVERT.

1. Where a testator gave land and negroes to the separate use of a *feme covert*, his daughter, expressing a want of confidence in her husband, and forbidding the trustee from letting him have possession of the slaves, but leaving it discretionary whether he would rent out the land or permit the family to occupy it, it was *Held* that the husband and wife had no equity to compel the trustee to give them possession of the property for a home. *Cox v. Williams*, 150.

2. The separate estate of a married woman is not liable to her personal engagements generally, but only where the debt is charged specifically upon her separate estate, with the concurrence of the trustee, if there be one. *Knox v. Jordan*, 175.

Vide Limitation in Remainder, 2.

SETTLEMENT OF AN ESTATE. *Vide* Bill for Settlement, etc.

SHERIFF'S COMMISSIONS.

Where an injunction was granted to restrain the collection of a part of an execution of *fi. fa.*, upon the condition that the plaintiffs would pay into the office from which the *fi. fa.* issued a certain amount of it admitted in the pleadings to be due, it was *Held* that a sheriff who had levied the *fi. fa.* for the whole sum on property sufficient to make it was entitled to his commissions on the amount paid into the clerk's office. *Dibble v. Aycock*, 399.

SLAVES ACCUSED OF FELONY IN THE HANDS OF AN EXECUTOR. *Vide* Executor.

SPECIFIC PERFORMANCE.

1. Where a party, who had covenanted to convey a tract of land, and given possession and taken bonds for the purchase money, got back the possession, on a bill for a specific performance, it was *Held* that he was liable for profits he had made, or reasonably might have made, while in possession. *Sugg v. Stowe*, 126.

2. Where a party made a bond for title, and afterwards sold the land for an advanced price and made title to another, so that he could not perform his contract specifically, it was *Held* that he was chargeable with the price received on the second sale with interest. *Ibid.*

3. Where the purchaser of an infant's land from him brought a bill to compel a performance of the agreement, which was in writing, on the ground that he, in combination with his father, fraudulently represented himself to be of age, and it appeared that the purchaser had notice that there was great doubt as to the seller's age, and it appeared also that the bargain was a bad one on the part of the infant, who was under the control of his father, and that the latter assumed the whole control of the negotiation and received the benefit of the price, the court refused to compel a specific performance. *Dibble v. Jones*, 389.

4. Where a bill for a specific performance contains a prayer for general relief, and the answer admits the payment of a part of the purchase

SPECIFIC PERFORMANCE—*Continued.*

money and contains an offer to settle, it was *Held* that the court, although it cannot decree a specific performance for want of a sufficient writing within the statute of frauds, will, nevertheless, decree an account and repayment. *Capps v. Holt*, 153.

Vide Contract as to Land.

STATUTE OF FRAUDS. *Vide* Parol Trusts.

STATUTE OF LIMITATIONS.

1. Where a wife sold a slave belonging to her husband, and took a bond for the price, payable to him, which she collected and reinvested in the name of another as her agent, it was *Held* that the administrator of the husband was not barred by the statute of limitations until three years had elapsed from the time of a demand and refusal to account. *Paschall v. Hall*, 108.

2. A purchaser (even with notice) from one purchasing fraudulently at a sheriff's sale (as by preventing a fair competition among bidders), who has had the land in possession for more than seven years before a suit in equity is brought for a reconveyance, is protected by the statute of limitations. *Whitfield v. Hill*, 316.

3. An action of ejectment, predicated on the assumption that a deed made by a sheriff for land sold, is void on account of a fraudulent suppression of bidding is not the same cause of action with a right asserted in a court of equity to have the purchaser converted into a trustee and to have a reconveyance, which assumes that the sheriff's deed is valid to pass the title, and, therefore, the pendency of the former is not a good answer to the plea of the statute of limitations. *Ibid.*

4. If it appear on the face of the bill that the plaintiff's case is barred by the statute of limitations, advantage may be taken of it by motion on the trial. *Ibid.*

5. A court of equity is governed by the statute of limitations and presumptions in the same manner a court of law is; where, therefore, a bill of sale of a slave not under seal contained a false warranty of soundness, and a bill was filed by the purchaser to restrain the collection of the purchase money, three years had elapsed between the discovery of the unsoundness and the filing of the bill, it was *Held* that the suit was barred by the statute of limitations. *Taylor v. McMurray*, 357.

6. Where there is a statute of limitation at law, which furnishes an analogy, a suit in equity *in pari materia* is barred by it. *Leggett v. Coffield*, 382.

7. Where, therefore, a married woman was entitled to property by a marriage settlement, which was sold and conveyed by her trustee and her husband during her coverture, it was *Held* that she was barred after the lapse of three years from the death of her husband from bringing a suit against the purchaser. *Ibid.*

8. Where a guardianship was closed by a settlement and release after the ward arrived at full age, it was *Held*, in analogy to the statute of limitations to an action of account at law, that the court would not

STATUTE OF LIMITATIONS—*Continued.*

entertain a bill to reopen the investigation of the guardian's accounts on the ground of undue influence, fraud, or mistake after three years from the closing of the trust. *Whedbee v. Whedbee*, 392.

9. A trustee who permits one to hold adversely to his title for more than seven years under a grant cannot sustain a bill to have such holder converted into a trustee, although the *cestui qui trust* may have been under age and out of the State at the time. *Blake v. Allman*, 407.

SUBROGATION.

Where one, believing that he was a surety on an administration bond, settled with the next of kin, who were under the like impression, the administrator becoming insolvent, it was *Held* that, on its appearing that he was not surety, he had an equity to be subrogated to the rights of the next of kin against the real sureties on the bond. *Capehart v. Mhoon*, 178.

SUBSEQUENT PURCHASERS.

Where a father made a deed of gift of a negro child to his son, who was also a child, and after eight years, during which time both remained under the control of the donor, sold and conveyed the slave to another for half its value, it was *Held* that the latter had no ground in equity to have the gift set aside and the donee declared a trustee for his use. *Jones v. Hall*, 26.

SURETIES. *Vide* Pleading, 2.

SURPLUSAGE. *Vide* Inconsistent Allegations.

TRUST NOT AFFECTED BY STATUTE OF FRAUDS.

Where A. paid the purchase money for a tract of land, and had the title made to B., on a parol trust, to hold it for A., it was declared that such trust was not embraced in the statute of frauds. But where it appeared that the contract was made to defraud creditors, the court declined interfering to compel a conveyance of the legal title. *Turner v. Eford*, 106.

TRUST, ACCEPTANCE OF. *Vide* Estoppel.

TRUST, DEED OF.

In a deed of trust to indemnify sureties by giving them a preference, the debt of the creditor supplies the consideration to support the deed; the creditor's interest is, therefore, the primary object to be protected in equity, and sureties' indemnity, though expressed to be first, is but secondary and incidental to the other object. *Wiswall v. Potts*, 184.

TRUSTEE.

A trustee who acquires an outstanding title adverse to that of his *cestuis qui trust* is considered, in equity, as having acquired it for their benefit, and cannot set it up for his own. *Brantly v. Kee*, 332.

UNDUE INFLUENCE.

Where a father, with whom his daughter resided and who was habitually under his influence and control, urged upon her, two days before the

UNDUE INFLUENCE—*Continued.*

time fixed upon by her for her marriage, to sign a deed giving away her property, which she did with reluctance and with earnest protestations against the act, it was *Held* that such conveyance was inoperative and of no effect as against the husband. *Poston v. Gillespie*, 258.

UNDISPOSED OF BALANCE. *Vide* Bequest to Slaves.

VAGUENESS. *Vide* Contract as to Land, 2.

VALUATION, WHEN MADE. *Vide* Confirmation of a Gift.

VESTED INTEREST. *Vide* Condition Rendered Impossible; Devise for Education, etc., 2.

VESTED LEGACY. *Vide* Power, 7.

VESTING, TIME OF. *Vide* Bequest of a Fund to a Class, 2.

VOLUNTARY CONVEYANCE. *Vide* Subsequent Purchaser.

"WHEN" USED AS INDICATING A CONDITION OR A PERIOD FOR VESTING. *Vide* Conditional Bequest, 1, 2.

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